Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LYNETTE HINSHAW,
Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTINA DEVON MAHLER, Deceased,
Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,
Intervenor/Respondent.

Petition for Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for the review of the Court are as follows:

1. Did the Ninth Circuit abrogate case law [Montana v. U.S., 450 U.S. 544, 564-65 (1981) and National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985)] concerning imposition of tribal court adjudicatory civil jurisdiction over non-Indians by relying upon dicta in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987), already placed in question in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, at 247 n.10 (1989), to impose civil adjudicatory jurisdiction over a non-Indian.

2. Did the Ninth Circuit err in allowing a tribal court civil adjudicatory jurisdiction over a survivorship

tort claim involving a non-Indian and the estate of a non-Indian, premised upon a supplemental jurisdiction concept, when tribal adjudicatory jurisdiction was non-existent?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of the parties are set forth in the caption of the case.

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Petition for Writ Of Certiorari To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Lynette Hinshaw, the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered on June 17, 1994.

OPINIONS BELOW

The July 11, 1989, Order of the Tribal Court of the Confederated Salish and Kootenai Tribes is reprinted in Appendix A to this petition. (Unpublished opinion.) The February 2, 1990, Appellate Opinion of the Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Tribes, Pablo, Montana, affirming the Tribal Court is reprinted in Appendix B to this petition. (Unpublished opinion.) The January 29, 1993, Opinion and Order of the United States District Court for the District of Montana, Missoula Division,

is reprinted in Appendix C to this petition. (Unpublished opinion.) The June 17, 1994, Memorandum of the United States Court of Appeals for the Ninth Circuit affirming the District Court decision is reprinted in Appendix D to this petition and, at the filing of this petition, is an unpublished opinion.

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case does not involve any constitutional and statutory provisions. The extent of tribal courts' jurisdiction over non-Indians on reservations has been defined by case law.

STATEMENT OF THE CASE

Course of Proceedings

In June of 1988, the Mahlers brought wrongful death and survivorship claims against Lynette Hinshaw (hereinafter "Hinshaw") in the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation [hereinafter Tribal Court]. Hinshaw appeared in the action solely to contest Tribal Court jurisdiction in the matter. Hinshaw contested tribal jurisdiction on the grounds that the cause of action arose out of an accident in which no tribal members were involved. Both the Tribal Court (Appendix A) and the Tribal Appellate Court (Appendix B) ruled that the Tribal Court had jurisdiction over the case.

Having exhausted her tribal

remedies, Hinshaw moved the Tribal Court to stay the proceedings therein, until such time as a review of Tribal Court jurisdiction could be made by the United States District Court. The motion was granted.

Basis for Federal Jurisdiction

The basis of the United States District Court's jurisdiction over this matter was premised on 28 U.S.C. § 1331, providing original federal district court jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. The question whether an Indian tribe retains the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court must be answered by reference to federal law and is a federal question under § 1331. National Farmers Union Insurance Cos. v. The Crow Tribe of

Indians, 471 U.S. 845, 852 (1985).

On January 29, 1993, District Judge Lovell issued his Order, which concluded that: (1) Hinshaw complied with the requirement of exhausting her Tribal Court remedies; (2) the Tribal Court has jurisdiction over the wrongful death and survivor claims; and (3) the Tribal Court has personal jurisdiction over Hinshaw. (See Appendix C.)

On June 17, 1994, the United States Court of Appeals affirmed the decision of the United States District Court. (See Appendix D.)

REASONS FOR GRANTING THE PETITION

1. This Court's holdings in National Farmers Union and Montana regarding the applicable standard of review for the assertion of tribal jurisdiction were circumvented in the lower court by presumption language lifted from dicta in Iowa Mutual.

The authority established by this Court espouses that Tribal Courts have limited civil jurisdiction over non-Indians on the reservation. Montana v. U.S., 450 U.S. 544 (1981), National Farmers Union v. Crow Tribe, 471 U.S. 845 (1995). Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. Montana, id. at 544, citing Williams v. Lee, 358 U.S. 217, 223 (1959), Morris v. Hitchcock, 194 U.S. 384 (1904), Buster v. Wright, 135 F. 947, 950 (CA8 1905).

In Montana this Court determined

that Indian tribes had power to punish tribal offenders and retain their inherent power to determine tribal membership, to regulate domestic relationships among members, and to prescribe rules of inheritance for members. Id. at 564. However, the exercise of tribal power beyond what was necessary to protect tribal self-government or to control internal relations was determined to be inconsistent with the independent status of the tribes and, therefore, could not survive without express congressional delegation. Montana, id. at 564 (citations omitted). In Montana this Court determined that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens or has some direct effect on

the political integrity, economic security, or health and welfare of the tribe. Id. at 566. (Citations omitted.)

The concept established by the Montana decision was reiterated by the subsequent decision of National Farmers Union Cos. v. Crow Tribe, id.

In National Farmers Union, this Court repeated the necessity of intrusion into tribal sovereignty as a prerequisite for Tribal Courts to acquire adjudicatory jurisdiction over non-Indians.

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855-56 (1985).

In National Farmers Union, this Court was unable to provide the lower courts with an example of the required "careful analysis." The reason was that the Court also held that the lower courts had not satisfied the "exhaustion requirement" under which all tribal remedies must be exhausted on the jurisdictional issues before the assertion of tribal jurisdiction can be reviewed by a federal court. Id. at 857. This Court therefore remanded the National Farmers Union litigation for further proceedings and stayed any specific inquiry into the jurisdictional issues presented in the case.

Lower courts have relied on the authority of National Farmers Union to refer all initial considerations on matters of tribal jurisdiction to the Tribal Courts. E.g., United States v.

Plainbull, 947 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991); Burlington Northern R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1244 (9th Cir. 1991); Native Village of Venetie I.R.A. Council v. Alaska, 918 F.2d 797 (9th Cir. 1990), reh'g denied, 944 F.2d 548 (9th Cir. 1991).

However, lower courts have been uncertain as to the applicability of National Farmers Union since this Court's decision in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), when this Court stated in dicta:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities **presumptively lies in the tribal courts** unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. 9, at 18 (citations omitted) (emphasis added).

In light of the language of presumption noted in Iowa Mutual, the lower courts now require specific guidance on the parameters of the "careful examination" to be conducted **after** the exhaustion of tribal remedies.

This Court has offered no decisions since National Farmers Union as to the applicability of the "careful analysis." The question of whether a presumption of jurisdiction of any nature exists is questionable.

> The Yakima Nation's reliance on statements about retained tribal sovereignty in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U. S. 845 (1985), and Iowa Mutual Ins. Co. v. LaPlante, 480 U. S. 9 (1987), is likewise misplaced. In neither of those cases did the Court decide whether the Indian Tribe had authority over the nonmembers involved. Instead, the Court established an exhaustion rule, allowing the

> tribal courts initially to determine whether they have jurisdiction, and left open the possibility that the exercise of jurisdiction could be later challenged in federal court. See 471 U. S., at 856-857; 480 U. S., at 16, 19.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, at 247 n.10 (1989).

The Tribal Court, Tribal Appellate Court, U.S. District Court, and the Ninth Circuit Court have departed from the accepted and usual course of proceeding by failing to apply the Brendale holding and continuing to use the Iowa Mutual presumption approach to tribal adjudicatory jurisdiction. In the decision of the lower court in this litigation, there is no discussion of how tribal sovereignty, *i.e.*, self-governing capability, is affected to the extent that the Montana and National Farmers Union decisions require the Tribal Court

to assume jurisdiction over a non-Indian to ensure its sovereign existence.

With respect to tort claims involving non-Indians, the lower courts have no specific guidance as to the parameters of the Tribal Court adjudicatory jurisdiction. There is a profound need for this Court to reconcile the National Farmers Union and Iowa Mutual decisions by deciding: 1) whether the language of presumption in Iowa Mutual effectively overrides the standard of review prescribed by National Farmers Union; 2) if the presumption is found to be the dicta as was indicated to be in Brendale, then there must be a specific determination as to the application of the Montana and National Farmers Union criteria to the question of civil tort jurisdiction of Tribal Courts over non-Indians found on the reservation. The

case at bar presents a fact scenario which requires resolution by means of just such a careful examination of tribal sovereignty.

The lower courts have also inappropriately cited the Montana Supreme Court decision of Larrivee v. Morigeau, 188 Mont. 187, 602 P.2d 563 (1979), cert. denied, 445 U.S. 964 (1979), as authority for the proposition that tribal courts have current jurisdiction over non-Indians. Larrivee involved two Indian parties. The issue was whether Montana state courts had jurisdiction over the Indian defendant. Larrivee is not applicable as authority for the converse, *i.e.*, jurisdiction of the Tribal Court over non-Indians. The Montana and National Farmers Union decisions occurred subsequent to Larrivee and are the applicable law as to tribal adjudicatory

jurisdiction over non-Indians. Larrivee is no authority whatsoever for tribal adjudicatory jurisdiction over non-Indians. It was a departure from accepted proceeding for all of the lower courts to utilize Larrivee as a part of their reasoning in granting jurisdiction over a non-Indian.

2. By improperly relying on a kind of supplemental jurisdiction the District Court and the Court of Appeals erred in their disposition of the survivorship claim.

Hinshaw contends that the survivorship claim properly lies in state court because it is an action by the estate of a non-Indian against another non-Indian which cannot impair the sovereignty of the Tribal Court.

The District Court declined to reach the question whether the Tribal Court would have jurisdiction over the survivorship if it had been presented

alone. (Appendix C-25.) Rather than address this preliminary matter, the District Court held that "[t]ribal sovereignty and judicial economy necessitate the conclusion that subject matter jurisdiction over the entire action, including both the wrongful death and survivorship claims, lies in tribal court . . . . " This position was upheld by the Court of Appeals. (Appendix D-7.)

In so ruling, the lower courts have awarded the Tribal Court jurisdiction comparable to supplemental jurisdiction over the survivorship claim. Subject matter jurisdiction is a prerequisite for adjudicatory jurisdiction of any court. See Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979). Indeed, supplemental jurisdiction (formerly known as ancillary or pendent jurisdiction) only arises in the federal courts by

means of special legislation. The exercise of supplemental jurisdiction by the federal courts is governed by 28 U.S.C. § 1367 (Supp. 1990). The statute, in pertinent part, provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (Supp. 1990).

Supplemental jurisdiction is a creature of and applies only to federal courts. The statute does not address Tribal Court jurisdiction, nor does it prescribe any means by which courts not regulated by Congress may assume "supplemental" jurisdiction. No reported

decisions extend adjudication jurisdiction of Tribal Courts over non-jurisdictional matters based upon a concept of supplemental jurisdiction. The National Farmers Union and Montana standards premised upon tribal sovereignty remain as prerequisites for tribal adjudicatory jurisdiction over non-Indians.

Under the holdings of the District Court and Court of Appeals, an Indian plaintiff is allowed to sue a non-Indian defendant in Tribal Court in a matter over which the Tribal Court lacks jurisdiction, merely by joining the action with another in which the tribe is concluded to have jurisdiction. The Court has decreed that when tribal jurisdiction is challenged under such circumstances, a "careful examination of tribal sovereignty" must be conducted.

National Farmers Union, at 855-56. The lower courts have declined to conduct the National Farmers Union analysis and instead, without any authority, supplied the tribal court with adjudicatory jurisdiction over the survivorship portion of the litigation that is clearly subject only to State of Montana jurisdiction. The Courts' reasoning, based only on efficiency concerns, was improper; where there is no jurisdiction, a court cannot hear a claim, regardless of "efficiency."

The survivorship action is brought in a representative capacity by the personal representative of the estate of a non-Indian against another non-Indian. The issues involved are not tribal issues because the damages are only attributable to non-Indians and do not involve any tribal matter. Moreover, the issues do

not challenge or potentially impair tribal sovereignty, involve any direct effect on the political integrity, economic security, or health or welfare of the Tribes as required by Montana v. U.S., 450 U.S. 544, at 566 (1981), and National Farmers Union at 855-56.

In their decisions, the lower courts stated concerns about limitations on tribal sovereignty and undermining the authority of the tribal court. The Montana and National Farmers Union prerequisites for tribal adjudicatory jurisdiction remain intact. How can state court jurisdiction over the survival claim impair tribal sovereignty? Undue deference to tribal courts as warned of is the result. Iowa Mutual, 480 U.S. at 21 (Stevens, J., concurring in part and dissenting in part). Thus, if the Court finds that tribal court

jurisdiction over the survivorship action lies beyond "the outer boundaries of an Indian Tribe's power over non-Indians," National Farmers Union, 471 U.S. at 851, then such a finding provides a legitimate limit on tribal sovereignty.

Without an effect on tribal sovereignty, no jurisdiction exists over either the wrongful death or survivorship actions against a non-Indian defendant. The wrongful death action is confused by a personal claim for non-injury consortium damages by the parents of the decedent. Neither of the plaintiff Mahlers were present at the accident scene. The traffic accident involved only non-Indians. The confusion of the wrongful death action is eliminated in the survivorship claim. Only estate claims exist in the survivorship litigation. No Indian claims, even

indirect consortium claims, exist. No possible sovereignty effect exists. No tribal adjudicatory jurisdiction exists over the survivorship claim, as the U.S. District Court plainly understood. (Appendix C-25, C-26.)

The failure of the courts below to conduct a "careful examination of tribal sovereignty" as required by National Farmers Union subjects this petitioner to the wrongful exercise of tribal court judicial power. The petition should be granted so that an appropriate judicial determination as to the interrelationship of the Montana, National Farmers Union, Iowa Mutual and Brendale decisions can be provided and the question of "supplemental jurisdiction" of tribal courts be resolved.

Innumerable individuals, insurance carriers, and their legal representatives

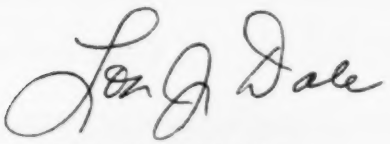
are daily involved in the difficult task of analysis of factual matters related to the parameters of civil tribal adjudicatory jurisdiction over non-Indians. There is no decision of this Court that charts the course as to limitations and guidelines for tribal courts exercising tribal adjudicatory jurisdiction over non-Indians. Tribal governments are all expansive, intent upon acquiring maximum political power. Tribal courts, as adjuncts of tribal government, render decisions allowing tribes to exercise civil jurisdiction over all entities within their reservations. This Court has decided that there are limits to tribal authority over non-Indians. Montana, id., National Farmers Union, id.; Brendale, id. However, the parameters of the tribal authority to regulate the civil affairs

of non-Indians involved in tort litigation remain mysterious and confusing.

CONCLUSION

The lower courts have departed from accepted case law and awarded a tribal court civil adjudicatory jurisdiction over a non-Indian in a controversy removed from an issue of tribal sovereignty. This Court is requested to grant the Petition for Certiorari and thoroughly review and define the parameters of tribal adjudicatory jurisdiction authority over non-Indians' noncontractual civil disputes emanating from conduct on reservations.

Respectfully submitted,



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APPENDIX A:

ORDER OF

THE TRIBAL COURT OF THE

CONFEDERATED SALISH AND KOOTENAI

TRIBES

DATED JULY 11, 1989

IN THE TRIBAL COURT
OF THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE
FLATHEAD INDIAN RESERVATION

GLORIA S. MAHLER AND KENNETH J. MAHLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF CHRISTIAN DEVON MAHLER, DECEASED. PLAINTIFFS. VS. LYNETTE HINSHAW, DEFENDANT.	O R D E R CAUSE NO. CV-2595-88

CASE MEMORANDUM

This matter came before the Court upon the filing of a Motion to Dismiss for lack of Personal jurisdiction by the

defendant, Lynette Hinshaw. The Plaintiffs' responded in opposition and a hearing was set to hear oral arguments on the 9th day of December, 1989. Both parties were present in court and represented by counsel.

The court, after having been fully advised in the matter now before it, makes the following findings:

1. That Gloria S. Mahler is an enrolled member of the Flathead Tribes;
2. That Kenneth J. Mahler is not an enrolled member of the Flathead Tribes but has submitted to the Jurisdiction of the Tribe by filing this action;
3. That Christian Devon Mahler, deceased, is not an enrolled member but is the descendant of an enrolled member;

4. That Lynette Hinshaw is not an enrolled member of the Flathead Tribe but resides within the exterior boundaries of the Flathead Indian Reservation at St. Ignatius, Mt.;

4. That the accident wherein the deceased died, occurred within the exterior boundaries of the Flathead Indian Reservation;

5. That the Confederated Salish and Kootenai Tribes have adopted broad jurisdiction over Civil matters arising within the exterior boundaries of the Flathead Indian Reservation. See: Paragraph 2 (a), § 1, Chapter 2, Law and Order Code.

6. That there is no Treaty or Federal Law limiting the ability of the Tribes to exercise civil jurisdiction over non-members

living or entering the Reservation for purposes of business, travel, residency or recreation;

DISCUSSION

The law upholding the ability of Indian tribes to exercise civil jurisdiction over non-members is clear and defined to the extent that leading Supreme Court cases have repeatedly ruled in favor of this exercise of civil jurisdiction. Iowa Mutual Insurance Company v. LaPlante, 107 S. Ct. 971 (1987); National Farmers Union Insurance Comps. v. Crow Tribe, 471 U.S. 845 (1985). Exercising Civil jurisdiction over persons found within the exterior boudaries of the Reservation is a Right that is supported by well-reasoned Tribal case law. See McDonald v. Racine, 15 I.L. Rep. 6013 (1988); Big Horse v. Confederated Salish and

Kootenai Tribes, et al, CV-1015-85. This jurisdictional power is boulstered by the fact that the Tribe has an interest in the health, safety and welfare of the their tribal members and their families while they are within the boundaries of the Reservation. This interest is further codified in tribal law and ordinances that reflect the desire to enforce laws protecting the Tribes and their members. See, for example, Resolution 85-188 and Chapter 1V of the Law and Order Code wherein the Tribes adopted and modified the Montana Traffic Code.

Subject matter jurisdiction over civil actions arising within the exterior boundaries of the Reservation is vested in the Tribal Courts by virtue of the Tribal Council passing laws that vest jurisdiction in the Court. This

jurisdictional grant directly affects the political integrity of the Tribe in that sovereign nations must have the ability to be self-determining by being able to regulate and adjudicate actions arising within the boundaries of their Nation.

In the case at Bar, the accident occurred within the boundaries of the Reservation on a highway that passes through the Reservation. The driver of one vehicle, the defendant, is a non-member residing with the Reservation; the driver of the other vehicle, a descendant of an enrolled member, was traveling on the highway passing through the Reservation. Jurisdiction over a cause of action arising out of the accident involving the defendant and the deceased lies exclusively with the Flathead Tribal Court. Personal

jurisdiction over the defendant also lies with the Tribal court because she resides within the exterior boundaries of the Flathead Reservation, and because she chooses to use the highway that runs through the Reservation. In a case such as this, it does not follow that on one hand the Tribe has jurisdiction over the subject matter but not the person. There can be no line drawing or distinction made between the ability of the Tribes to pass laws protecting all persons found within the exterior boundaries of the Reservation and the State of Montana passing laws to protect all citizens of the State, within the boundaries of the State. A member of the Tribes is subject to the jurisdiction of the State the instant he/she leaves the Reservation and the same premise would hold for non-members

entering the reservation, exlcuding criminal actions.

O R D E R

Therefore, it is hereby ordered, adjudged and decreed that the Confederated Salish and Kootenai Tribes have both subject matter and personal jurisdiction in this cause of action.

Dated this 11th day of July, 1989.

/s/ Bonnie Combes
BONNIE COMBES
Special Judge

APPENDIX B:

APPELLATE OPINION OF THE APPELLATE COURT OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD TRIBES, PABLO, MONTANA DATED FEBRUARY 2, 1990

IN THE APPELLATE COURT OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD TRIBES, PABLO, MONTANA

GLORIA S. MAHLER and KENNETH J. MAHLER, individually and as Personal Representatives of the ESTATE OF CHRISTIAN DAVON MAHLER, Deceased,	)	Cause No. CV-3595-88
Plaintiffs and Respondents,	)	APPELLATE OPINION
vs.	)	
LYNETTE HINSHAW,	)	
Defendant and Appellant.	)	

By Charles R. Hostnik, Associate Justice:

On January 26, 1990, the Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation convened in Pablo, Montana

to hear this appeal. The appeal proceeding was conducted pursuant to the provisions of the Law and Order Code of the Confederated Salish and Kootenai Indian Tribes of the Flathead Reservation, Montana (hereinafter "Law and Order Code"), Ch. I, Sec. 6. The matters before the Appellate Judges at that time were the briefs submitted by the parties, as well as a certified recording of the trial court proceedings. The Appellate Panel was composed of the Honorable Elbridge Coochise, Chief Justice; the Honorable Hollis Chough, Associate Justice; and the Honorable Charles Hostnik, Associate Justice.

I. BACKGROUND

On June 29, 1988, Plaintiffs filed a Complaint in the trial court of the Confederated Salish and Kootenai Tribes

of the Flathead Reservation for damages based upon a wrongful death claim and a survival claim. The Complaint alleged that on July 4, 1986, Christian Mahler, riding a motorcycle, was involved in an accident with an automobile driven by Defendant Lynette Hinshaw. Christian Mahler allegedly sustained injuries in that accident that led to his death.

The Plaintiffs (Respondents on appeal) are the parents of Christian Mahler. They commenced a probate action in Montana State Court to probate the estate of Christian Mahler. Plaintiffs were appointed co-personal representatives of Christian Mahler's estate in that State Court probate action.

Respondents then filed this action in Tribal Court. This action was commenced by Respondents in both their

individual capacities as well as in their capacities as co-personal representatives of the estate of Christian Mahler.

After the Complaint was filed, the Defendant (Appellant on appeal) entered an appearance to contest the Tribal Court's jurisdiction, prior to filing an Answer to the Complaint. Those jurisdictional arguments were raised in the form of a Motion to Dismiss. That motion was denied by the trial judge on July 11, 1989. This appeal followed.

II. ISSUES ON APPEAL

The issues presented on appeal relate solely to whether the Tribal Court has jurisdiction to hear this action. The Appellant contends, first, that the Tribal Court did not have subject matter jurisdiction over this action.

Second, she contends that if the Flathead Tribal Court does have subject matter jurisdiction, such jurisdiction is concurrent with the jurisdiction of the Montana State District Court. Since the probate action was commenced in State Court, Appellant argues this action should be heard by the State Court rather than this Tribal Court.

Finally, Appellant contends the Flathead Tribal Court does not have personal jurisdiction over her.

III. DOES THE FLATHEAD TRIBAL COURT HAVE SUBJECT MATTER JURISDICTION?

The parties agree that the statute governing subject matter jurisdiction is Confederated Salish and Kootenai Tribal Ordinance 36B. The applicable provisions of that ordinance provide as follows:

> (a) To the fullest extent possible, not inconsistent

with federal law, the tribes may exercise, their civil, regulatory and adjudicatory powers. To the fullest extent possible, not inconsistent with federal law, the Tribal Court may execute subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:

(1) All persons found within the reservation.

(2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:

(i) The transaction of any business within the reservation;

(ii) The ownership, use or possession of any property, or interest therein situated within the reservation.

(iii) The entering into of any type of contract within the reservation, or wherein any aspect of any contract is

> performed within the reservation.
>
> (iv) The injury or damage to property of the tribes or a tribal member.
>
> (b) As used in this section, "person" means an individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity. Nothing in this chapter waives any aspect of the tribe's sovereign immunity or related privileges.

Ordinance 36B (codified as Law and Order Code), Ch. II, Sec. 1(2). It is clear from the ordinance that this Tribal Court is to exercise civil jurisdiction "to the fullest extent possible".

As acknowledged by the Appellant, subject matter jurisdiction under this ordinance is determined by the parties and the location of the dispute. Appellant argues that since the only

party to this proceeding who is a tribal member is the decedent's mother, no jurisdiction exists in the Tribal Court. However, the definition of the term "person" is not limited to tribal members. See Law and Order Code, Ch. II, Sec. 1(2)(b). Therefore, the status of the parties as tribal members or nontribal members is irrelevant to determining subject matter jurisdiction under the provisions of Ordinance 36B.

The location of the accident was within the exterior boundaries of the Flathead Reservation. See Law and Order Code, Ch. I, Sec. 2(5). It was within the Reservation where the Appellant is alleged to have owned, used, and/or possessed a motor vehicle in a manner which led to the death of Christian Mahler.

Civil jurisdiction over the

activites of non-Indians on reservation lands presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 94 L.Ed.2d 10, 107 S.Ct.971, 14 Indian L.Rep. 1015 (1987). It is clear from the above discussion that under the Law and Order Code of the Tribes, this court has subject matter jurisdiction over this case.

A limit to the exercise of the Tribal Court's civil jurisdiction is that exercise of such jurisdiction cannot be inconsistent with federal law. Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 493, 101 S.Ct. 1245, 8 Indian Law Reporter 1005 (1981) provides guidance with respect to any limiting aspects of federal law on exercise of the Tribal Court's subject matter

jurisdiction. The United States Supreme Court in that case indicated:

> ... Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. ... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. U.S., supra, 450 U.S. at 565-566, 8 Indian Law Reporter at 1011 (1981) (citations omitted; emphasis added).

Tribal governments, like state governments, have an interest In

developing and enforcing safety standards designed to encourage attentiveness and caution on the part of all persons operating vehicles on roads open to the public within the Reservation. Estate of Bighorse, 15 Indian L. Rep. 6048, (1988), modified In part on other grounds, 16 Indian L. Rep. 6025 (1989). A Tribe's regulation of motor vehicle traffic within the exterior boundaries of a reservation directly relates to improving and protecting the health and welfare of the Tribe and its members by decreasing injuries occurring on the reservation to tribal members and to others. In this case, the Confederated Salish and Kootenai Tribes have adopted the Montana Traffic Code, with modifications. No doubt substantial tribal resources have been expended to enforce this Code, and

therefore, to maintain the health and safety of all persons found within the Reservation. The Tribal Court's exercise of subject matter jurisdiction is not inconsistent with federal law.

The fact that the decedent was not an enrolled tribal member is irrelevant in connection with this analysis. A Tribe is composed of not only enrolled members, but also the families of those enrolled members. The Tribe's interest in protecting its political integrity, economic security and the health and welfare of the Tribe as a whole includes protection of the families of enrolled members. There is no basis for denying subject matter jurisdiction to the Tribal Court in this case simply because the decedent was not an enrolled member of the Tribe.

The expressed intent of the

Confederated Salish and Kootenai Tribes is to exercise its jurisdictional powers to the fullest extent possible. See Law and Order Code, Ch. I, Sec. 2(1)(b). The Tribes have declared that the Tribal Court is required to exercise its jurisdiction to the fullest extent possible. Law and Order Code, Ch. II, Sec. 1(2)(a).

This Tribal Court has previously ruled it has subject matter jurisdiction over tort actions arising from vehicular accidents when they occur within the exterior boundaries of the Reservation and involve persons under this Court's jurisdiction. Estate of Bighorse, supra, 15 Indian L. Rep. at 6049. This Tribal Court has subject matter jurisdiction over this action.

IV. CONCURRENT JURISDICTION

Appellant argues that if this Court

finds that subject matter jurisdiction exists in the Tribal Court, such jurisdiction is concurrent with Montana State Courts. If that is the case, according to Appellant, since the Respondents opened a probate action in State Court, this action must be brought in the State Court pursuant to the Tribe's Law and Order Code.

Appellant relies upon the following section of the Law and Order Code:

> 3. ... the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol.1, Chap. 81, p.170, Sections 2-1-301 - 2-1-306 MCA, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following: ... (h) Operation of Motor Vehicles upon Public Streets, Alleys, Roads and Highways; ...

> 4. The effectiveness of (3) above is conditioned upon the following:
>
> (a) Concurrent jurisdiction remains with the Tribal Court and in the Tribal Government (where applicable with Federal Courts) of all matters referred to in Subsection (3); and any matter initiated in either a State or Tribal Court shall be completed and disposed of in that Court, and shall not be subject to reexamination in the Courts of the other jurisdiction.

Law and Order Code, Ch. I, Sec. 2 (3,4).

Appellant's argument focuses on the institution of the State Court probate proceedings as the act which gives rise to concurrent jurisdiction. However, Appellant also acknowledges that

> the Tribal Court would not have, and does not have, jurisdiction over the estate of the decedent. The Tribal Court does not have jurisdiction over the estate of the decedent, because the decedent was not a tribal member.

Brief of Appellant, p.19. Appellant's assertion is correct. This Tribal Court only has jurisdiction to probate the estates of tribal members. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Code of Domestic Relations, Ch. V, Sec. 10(1). Therefore, there is no concurrent probate jurisdiction in both State and Tribal Courts.

*****

However, this action does not relate to administration of the estate. Even if there were concurrent probate jurisdiction, Appellant's argument would fail. The action commenced in this Tribal Court does not relate to administration of the decedent's estate. It is a different type of action -- a tort action for personal injuries.

Even if Respondents were to bring

the wrongful death and survival claims in State Court, they would have to commence a separate action, pay a separate filing fee, and could not pursue those claims under the previously filed probate case. A Montana State Court, exercising probate jurisdiction would not have authority to adjudicate the wrongful death claim, since a wrongful death claim is not a part of the estate of a decedent. In Re Estate of Pegg, 209 Mont. 71, 680 P.2d 316 (1984). But see In Re Estate of Farnum, 224 Mont. 304, 730 P.2d 391 (1986). We do not have a situation where the same claims are being litigated between the same parties in two different forums. The Appellant involved in this case is not named as a Defendant in the State Court probate action.

This issue has arisen in an

analogous situation, where the jurisdiction of federal courts has been questioned in cases arising by and against estates, where probate proceedings had already been commenced in State Court. Two theories allow the federal courts jurisdiction to entertain such actions.

First, so long as the federal court does not interfere with the probate proceedings or assume control of the probate, the action can be maintained in federal court. Markham v. Allen, 326 U.S. 490, 494, 90 L.Ed. 256, 66 S. Ct. 296 (1945), rev'd in part on other grounds, sub nom, Clark v. Allen, 331 U.S. 503, 91 L.Ed. 1633, 67 S. Ct. 1431 (1946). See also, 61 ALR Fed. 536 §7[b]. The Tribal Court action here is not interfering with the State Court probate proceedings. This theory would

allow this Tribal Court action to proceed.

Second, some federal courts have adopted the distinction between actions in personam and in rem. With regard to in personam actions, both a state probate court and a federal court have been held to have concurrent jurisdiction. This enables the claimant to bring the action in either forum. See 61 ALR Fed. 536, §8. The claim in this case is an in personam claim being brought against an individual who resides within the exterior boundaries of the Flathead Reservation. Therefore, this second theory applies to allow the Tribal Court to proceed with this case.

Action Initiated in Tribal Court

The Law and Order Code section relied upon by Appellant for their concurrent jurisdiction argument

provides:

> Concurrent jurisdiction remains with the Tribal Court ... of all matters referred to in Subsection (3) [which includes operation of motor vehicles within the Flathead Reservation]; and any matter initiated in either a State or Tribal Court shall be completed and disposed of in that court ...

Law and Order Code, Ch. I, Sec. 2(4)(a) (emphasis added).

The term "initiated" is not defined by the Law and Order Code. The Appellant's view is that this claim against her was "initiated" when the probate action was commenced in State District Court.

The term "initiate" has been defined in a variety of ways.

> To start a movement. To commence something, for example a proceeding. To propose for approval.

Balentine's Law Dictionary, 3rd Ed.

(1969). Was this claim against the Appellant commenced by the institution of probate proceedings in State District Court, or was it commenced when the complaint was filed in the Tribal Court?

The phrase "initiation of proceedings" is defined as setting the machinery of the law in motion. Restatement 2d, Torts, §674, Comment a. That Comment goes on to explain that one who files a counterclaim to a cause of action is the one who "initiates" a proceeding on that claim. If Appellant's argument that suit against her in Tribal Court is barred because of the previously commenced probate action in State Court, the Restatement definition of "initiation" with respect to a counterclaim would relate back to the original filing of the action. There would be no distinction between the

original filing of the action and the filing of the counterclaim. This is not the result contemplated by the Restatement.

In this case the filing of the probate action in State Court may well have been a condition precedent to the filing of a separate action by the estate against the Appellant. Nonetheless, a separate action would have had to be brought against the Appellant for injuries based on the accident at issue. Concurrent subject matter jurisdiction for that tort action exists both in the Montana State Court and in this Tribal Court. Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979), cert. den. 445 U.S. 964 (1980). Respondents were free to choose the forum in which this particular claim against this particular Appellant was to

be commenced. The prior probate proceedings did not involve this particular claim nor this particular Appellant. Therefore, that prior probate proceeding did not "initiate" this matter. The initiation of this claim against the Appellant relates back to the filing of the complaint with the Tribal Court, and does not relate back to the commencement of the state probate action.

Respondents were free to choose the forum in which to bring this separate tort action. No election of forum occurred until this action was filed in Tribal Court. All the parties reside on the Flathead Reservation, Appellant was served on the Reservation, and the witnesses are presumably located on the Reservation. The filing of this action in Tribal Court was appropriate.

V. PERSONAL JURISDICTION OVER APPELLANT

The Appellant contends that the Tribal Court does not have personal jurisdiction over her, or over the Respondents.

Personal Jurisdiction Over Respondents

The Respondents voluntarily subjected themselves to the personal jurisdiction of the Court by applying to the Tribal Court for the relief requested in their Complaint. This Court's personal jurisdiction over the Respondents is not an issue.

Appellant raises the argument that the Tribal Court does not have jurisdiction over the estate of the decedent, because the decedent was not a tribal member. This argument confuses the true nature of these proceedings. The Tribal Court is not being asked to exercise jurisdiction to administer the

decedent's estate. The Tribal Court is requested to entertain a tort action for personal injuries suffered by the parents of the decedent, as well as for a claim which is a claim of the decedent's estate.

Whether the Tribal Court has subject matter jurisdiction over a probate action is simply irrelevant to this inquiry. The co-personal representatives of the estate stand in the shoes of the decedent for purposes of this action. The decedent, if he had survived, could have come into Tribal Court to institute and prosecute a tort action for personal injuries. The fact that decedent did not survive does not divest the Tribal Court of personal or subject matter jurisdiction.

Personal Jurisdiction Over Appellant

The fundamental requirement for

evoking personal jurisdiction is the the existence or some relationship between the Tribe and the parties to the action such that it is reasonable for the Tribal Court to exercise control over the parties. Estate of Bighorse, supra, 15 Indian L. Rep. at 6049 (1988).

Personal jurisdiction over the Appellant in this case is governed by Tribal Ordinance 36B. Under that ordinance, personal jurisdiction extends to and includes all persons found within the Reservation. Confederated Salish and Kootenai Tribal Ordinance 36B (codified as Law and Order Code) Ch. II, Sec. 1(2)(a)(1). The Defendant, being a resident of a town which is located within the exterior boundaries of the Reservation is a person found within the Reservation.

Under Tribal Ordinance 36B, the

Tribal Court also has jurisdiction over Appellant because she is a person "subject to the jurisdiction of the Tribal Court and involved directly or indirectly in ... the ownership, use or possession of any property [her motor vehicle] ... situated within the Reservation..." Law and Order Code, Ch. II, Sec. 1(2)(a)(2)(ii).

This is not a situation where the Appellant is merely using the roadways on the Reservation to pass through the Reservation. Appellant in fact resides on the Reservation and presumably uses those roads every day. She also is benefiting from Tribal resources. She benefits from Tribal Police protection, Tribal utilities, and other resources. Therefore, there are much greater ties to Appellant than if she were merely traveling through the Reservation.

There exists a sufficient relationship between the Tribe and the Appellant such that it is reasonable for the Tribal Court in this case to exercise control over her. The Tribal Court has personal jurisdiction over the parties to this action.

VI. CONCLUSION

Based upon the foregoing, the Order of Special Judge Bonnie Combes, dated July 11, 1989 is hereby affirmed. The Tribal Court of the Confederated Salish and Kootenai Tribes have both subject matter jurisdiction and personal jurisdiction over the parties in this cause of action. This action is remanded for further proceedings.

DATED this 2nd day of February, 1990.

/s/ Charles R. Hostnik
CHARLES R. HOSTNIK
Associate Justice

I concur:

/s/ Elbridge Coochise
ELBRIDGE COOCHISE, Chief Justice

/s/ Hollis Chough
HOLLIS CHOUGH, Associate Justice

CERTIFICATE OF MAILING

I, SUSIE LOUGHLIN, CLERK OF COURT, DO HEREBY CERTIFY THAT I HAVE MAILED TRUE AND CORRECT COPIES OF THE ABOVE APPELLATE COURT ORDER TO THE PARTIES FIRST-NAMED THEREIN AT THE ADDRESSES SHOWN BY DEPOSITING SAID APPELLATE COURT ORDER IN THE U.S. MAIL, POSTAGE PREPAID AT PABLO, MONTANA ON THE DATE BELOW STATED.

LON J. DALE ESQ.
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201 WEST MAIN
MISSOULA, MONTANA 59802

February 16, 1990 /s/ Susie Loughlin
CHIEF CLERK OF COURT

APPENDIX C:

OPINION AND ORDER OF

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

DATED JANUARY 29, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

****

LYNETTE HINSHAW,

Petitioner,

CV 90-71-M-CCL

-V-

GLORIA S. MAHLER and KENNETH J. MAHLER, Individually and as Person Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, DECEASED,

OPINION AND ORDER

Respondents,

and

THE CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor-Respondent.

****

Before the court is Lynette Hinshaw's petition for review of the decision of the Tribal Court of the

Confederated Salish and Kootenai Tribes of the Flathead Reservation that the Tribal Court has jurisdiction over an action there pending. Petitioner moves for summary judgment and contends that as a matter of law no subject matter and/or personal jurisdiction exists in the Tribal Court over the wrongful death and survivorship claims arising out of an automobile/motorcycle collision between two non-Tribal members occurring within the exterior boundaries of the Flathead Reservation.

PROCEDURAL BACKGROUND

Respondents Gloria and Kenneth Mahler commenced an action against Lynette Hinshaw in the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes") in which they allege that their son, Christian Mahler, was killed in an

automobile/ motorcycle collision as a result of the negligence of Lynette Hinshaw. Their suit asserts a claim for wrongful death on their own behalf and a claim on behalf of the estate of Christian Mahler for his pain and suffering and other losses. The Defendant filed a motion to dismiss for lack of subject matter and personal jurisdiction but the motion was denied by the Tribal Court. The Petitioner then filed an appeal of the Tribal Court's ruling. Pursuant to the Law and Order Code of the Confederated Salish and Kootenai Tribes, a three-judge appellate panel heard the appeal on the question of jurisdiction raised in the motion to dismiss. The Tribal Appellate Court affirmed the Tribal Court and held that the Tribal Court has both subject matter jurisdiction and personal

jurisdiction over the claims and parties in the action. Having exhausted remedies in Tribal Court, Defendant Hinshaw petitions this court to review the issue of Tribal Court jurisdiction.

FACTS OF THE CASE

The accident occurred on Montana Highway 93 in Lake County, Montana on July 4, 1986. The collision occurred within the exterior boundaries of the Flathead Reservation. The collision involved an automobile driven by Lynette Hinshaw and a motorcycle driven by Christian Mahler.

At the time of the accident, Petitioner was residing near St. Ignatius, Montana, which is located within the exterior boundaries of the Flathead Reservation. Petitioner is not a member of the Confederated Salish and Kootenai Tribes. Respondents Gloria and

Kenneth Mahler are the parents of the decedent, Christian Mahler. Gloria Mahler is a member of the Confederated Tribes. However, Kenneth Mahler is not a Tribal member and Christian Mahler was not a Tribal member.

ANALYSIS

EXHAUSTION

The first issue before the court is raised by Intervenor Tribes' contention that Petitioner has failed to properly comply with the requirement of exhaustion of tribal remedies. A federal court must stay its hand and give the tribal court the first opportunity to address the issue of tribal jurisdiction. National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987). This exhaustion requirement is based on

notions of comity and allows the tribal court to apply its special expertise in tribal matters and to develop a record to aid the federal court in making a determination should tribal jurisdiction be challenged. National Farmers Union, 471 U.S. at 857.

In this case, Petitioner appeared in Tribal Court specifically to contest its jurisdiction. The Tribal Court received briefing and heard argument before ruling that it did have jurisdiction over the matter. The matter was then properly appealed to the Tribal Appellate Court which affirmed the ruling. The Tribal Appellate Court then made a finding that Tribal remedies had been exhausted and stayed the Tribal Court proceedings until this court had an opportunity to review the jurisdictional question.

Intervenor contends that Petitioner has improperly expanded the record by submitting to this court depositions which were not before the Tribal Court. Because the underlying determinative facts are not in dispute and were presented to the Tribal Court in their entirety, the court finds no failure to comply with the exhaustion requirement on this basis.

Intervenor also contends that new arguments are raised by Petitioner in this court which were not fully developed in the Tribal Court proceedings. However, the Tribal Court is well versed in all aspects of tribal jurisdictional law and this court can safely presume that it engaged in a complete analysis of the jurisdictional issue before making its determination regardless of any attempts by Petitioner

at this juncture to modify her arguments. Therefore, the court finds, as the Tribal Court did, that Petitioner has exhausted her Tribal remedies on the jurisdictional issue.

TRIBAL SUBJECT MATTER JURISDICTION

As an initial matter, the court finds that the Mahler's appointment in state court as co-personal representatives of Christian Mahler's estate does not control the question of jurisdiction in this case. In Matter of the Estate of Farnum, 730 P.2d 391 (Mont. 1986), the Montana Supreme Court upheld the district court's decision that it had no jurisdiction over the distribution of judgment monies obtained from a wrongful death action while sitting as a probate court. Id. at 395. Because a state probate court does not have jurisdiction over a wrongful death

action, Petitioner's arguments that Gloria Mahler initiated her claims in state court by virtue of the probate proceedings are without merit.

This action was brought in Tribal Court by Gloria and Kenneth Mahler and consists of two separate and distinct claims. First, Gloria and Kenneth Mahler assert a wrongful death claim as individuals. Second, in their capacities as co-personal representatives of the estate of Christian Mahler, they have asserted a survivorship claim. It is the difference between these two claims that is the crux of the jurisdictional issue before the court.

it is a fundamental tenet of tribal sovereignty that reservation Indians have the right "to make their own laws and be ruled by them." Williams v. Lee,

358 U.S. 217, 220 (1959). In Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), the Supreme Court determined that tribal criminal jurisdiction over nonmembers is restricted. However, the same limitations do not apply in the civil arena. See National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987). In Iowa Mutual, the Supreme Court held that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. (Citations omitted). Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual, 480 U.S. at 18. To determine the limits of tribal

jurisdiction in a given case, a court must engage in a "careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." National Farmers Union, 471 U.S. at 855-856.

Pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq., the Tribes adopted a federally approved constitution that affirms the right to develop a court system. The Tribal Court's civil jurisdiction is defined by Tribal Ordinance 36-B (as amended), a federally approved set of laws and procedures entitled "The Law and Order Code of the

Confederated Salish and Kootenai Tribes of the Flathead Reservation." Under this federally approved ordinance, Tribal Court jurisdiction extends:

> 2. (a) To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. To the fullest extent possible not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:
>
> (1) All persons found within the Reservation.
>
> (2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:
>
> (i) The transaction of any business within the Reservation;
>
> (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
>
> (iii) The entering into any type of contract within the Reservation or wherein any aspect of any

contract is performed within the Reservation;

(iv) The injury or damage to property of the Tribes or a Tribal member.

Though this ordinance establishes that the Tribal Court is empowered to hear cases over which it has jurisdiction, it acknowledges that such jurisdiction cannot be inconsistent with federal law. The federal statutory law with the most impact on civil jurisdiction on the Flathead Reservation is Public Law 280.

The federal Act of August 15, 1953 (Pub.L. 83-280, 83rd Cong., 2d Sess.), 67 Stat. 588, amended Publication 90-284, 82 Stat. 73, 78, 25 U.S.C. 1321, et seq., ("PL-280"), allowed for the permissive extension of state jurisdiction over Indians residing on Indian Reservations within applicable states.

In 1963, the Montana Legislature enacted § 2-1-302, M.C.A., which provides that if the governor of the State of Montana receives a resolution from the Tribal Council of the Confederated Salish and Kootenai Tribes, or any other tribe within the state, expressing a desire that its people and lands be subject to the criminal or civil jurisdiction of the state, then the governor may issue a proclamation to that effect and such jurisdiction would apply to that land and the members residing thereon.

On May 5, 1965, the Tribal Council of the Confederated Salish and Kootenai Tribes adopted Tribal Ordinance 40-A (Revised), which provides in pertinent part:

> (1) Subject to the conditions and limitations expressed in (2) hereof, the

laws and jurisdiction of the State of Montana, including the judicial system of the state, are hereby extended pursuant to, and subject to the conditions in, the act of the Montana legislature of February 27, 1963, laws of Montana, 1973, Vol. 1, Chap. 81, P. 170, to the Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory school attendance;

(b) Public Welfare;

(c) Domestic Relations (exception adoptions);

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted;

(e) Juvenile Delinquency and Youth Rehabilitation;

(f) Adoption Proceedings (with consent of the Tribes);

(g) Abandoned . . . or Abused Children;

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads, and Highways;

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

(2) The effectiveness of subsection (1) hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with federal courts) with the Tribal Court and in the Tribal government of all matters referred to in subsection (1); and any matter initiated in either state or federal government court or the Tribal court shall be completed and disposed of in that court and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) . . .

(d) All jurisdiction of the Confederated Tribes under their constitution and bylaws, and ordinances enacted

> pursuant thereto, and of the federal government under the United State Criminal code, to the extent not expressly transferred by subsection (1) hereof, remains in the Confederated Tribes and in the federal government, respectively to the same extent as if this ordinance had not been adopted.

It is clear from the preceding language that the extension of state civil jurisdiction over Tribal matters is limited to those specific matters set forth in Tribal Ordinance 40-A and does not extend beyond that. It is also clear, and Petitioner concedes, that Tribal Ordinance 40-A in conjunction with PL-280 creates a system of concurrent jurisdiction over the specified matters. The Montana Supreme Court has interpreted Ordinance 40-A and PL-280 and concluded that they work together to create concurrent adjudicatory jurisdiction over tort

claims arising out of traffic accidents involving Indians on the Flathead Reservation. Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979).

Petitioner, however, contends that where an accident occurs on the Reservation which involves only non-Tribal members and the tort claim arising from that accident is a claim by one nonmember against another nonmember, exclusive jurisdiction over the claim lies in state court. In support of this contention, Petitioner argues that no authority exists for extending Tribal jurisdiction over claims that do not affect Tribal interests. Additionally, Petitioner argues that the Tribes do not have jurisdiction over any claim arising from an accident involving two nonmembers occurring on Reservation roadways because the Tribes have

acquiesced to state regulatory authority over motor vehicle travel on the reservation at least to the extent that Tribal members are not involved. Petitioner contends that this alleged acquiescence by the Tribes to state regulatory authority constitutes a voluntary divestiture of jurisdiction in this case.

The court need not conclusively determine the merits of these arguments, however, because Petitioner's basic assertion that only nonmembers are involved in the claims brought in Tribal Court is incorrect and fails to acknowledge the fundamental distinction between the two separate claims included in this action.

The survivorship action is unquestionably brought in a representative capacity by Gloria Mahler

as co-personal representative of the estate of the decedent, Christian Mahler. Petitioner focuses on the representative capacity in the survivorship claim and then relies on statutory provisions of Montana law to support her assertion that the wrongful death claim must also be brought in a representative capacity. Petitioner uses these Montana statutory provisions to strengthen her position that Gloria Mahler is not a real party in interest in this case but merely the representative of a non-Tribal member's estate.

Under Section 27-1-513, M.C.A., the personal representative of a decedent's estate is the designated party to maintain a wrongful death action. Additionally, under Section 27-1-501(2), M.C.A., wrongful death claims and

survivorship claims must be combined in one legal action. Therefore, under Montana law both a wrongful death claim and a survivorship claim are brought in a representative capacity.

Gloria Mahler, however, is not proceeding in state court but in Tribal court under Tribal law which does not require that a wrongful death claim be brought by the personal representative of the decedent's estate. Tribal law also does not require that a survivorship claim and a wrongful death claim be brought together. Therefore, Petitioner's argument that a wrongful death claim must be brought in a representative capacity is based only on specific statutory provisions of Montana law rather than Tribal law.

A wrongful death claim, unlike a survivorship claim, does not belong to

the decedent's estate but to the individual who has suffered the loss. Even under Montana law it is well settled that damages recovered in a wrongful death action are not part of a decedent's estate but are personal to the heirs. See Matter of Estate of Pegg, 680 P.2d 316, 321 (Mont. 1984).

Gloria Mahler's wrongful death claim is personal to her, and no provision of Tribal law requires that she bring it in any capacity other than that as an individual. Therefore, the wrongful death claim constitutes a tort action by a Tribal member for injuries personally suffered by that Tribal member as the result of an accident which occurred on the Flathead Reservation. The Tribal court has jurisdiction over the claim notwithstanding the fact that the

tribal member was not present at the scene of the accident.

Having concluded that the Tribal Court does have jurisdiction over Gloria Mahler's wrongful death claim, the court must now consider the propriety of Tribal Court jurisdiction over the survivorship claim brought by Gloria Mahler in her capacity as co-personal representative of her son's estate. Though the court recognizes the clear distinction between the two claims, the conclusion that jurisdiction over the wrongful death claim properly lies in Tribal Court must further lead to the conclusion that jurisdiction over the entire action, including the survivorship claim, properly lies in Tribal Court.

This decision is limited to the specific factual situation currently

before the court. A wrongful death claim has been brought in Tribal Court by a Tribal member asserting personal injuries as the result of an accident which occurred on the Flathead Indian Reservation. Under such a claim, Gloria Mahler's interests, and therefore the Tribes', are not minimal, tenuous, or contingent. Any recovery belongs to Gloria Mahler as an individual and not to the estate of a nonmember decedent. Therefore, no federal statute, judicial decision, treaty or executive policy acts to divest the Tribes of jurisdiction over such a claim raised in such circumstances. Though the survivorship claim is raised in a representative capacity, concerns injuries suffered by a nonmember decedent and any recovery belongs to the decedent's estate, the Tribal Court must

retain jurisdiction over it lest its authority to hear the wrongful death claim be undermined.

The court does not here decide whether the Tribal Court would retain jurisdiction over the survivorship claim had it been brought by itself. Under the specific circumstances of this case, the survivorship action has been joined with a wrongful death claim over which the Tribal Court does have jurisdiction. Therefore, the court must address the effects on that proper jurisdiction should Gloria Mahler be compelled to proceed with the survivorship claim in state court.

Exclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her

rights as an individual litigant but also upon the lawful authority of the Tribal Court itself. If the state is granted exclusive jurisdiction over the survivorship claim, Gloria Mahler will be forced to either split the litigation between two separate courts with the resulting increase in costs and waste of judicial resources, or take the entire action, including the wrongful death claim, into state court. Exclusive jurisdiction in state court of the survivorship claim in this situation would, therefore, constitute a de facto limitation on Tribal sovereignty by obstructing Gloria Mahler's right to proceed in Tribal Court because of practical and economic obstacles in her path.

Tribal courts have been held to play a "vital role in tribal self-

government." Iowa Mutual, 480 U.S. at 14. Furthermore, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and selfgovernment, the state courts are generally divested of jurisdiction as a matter of federal law." Id. at 15. In this case, exclusive jurisdiction in state court over the survivorship claim would constitute an impermissible intrusion by the state into Tribal affairs by undermining the authority of the Tribal Court to hear the wrongful death claim by effectively chilling Gloria Mahler's right to proceed in Tribal Court for that claim.

Therefore, Tribal sovereignty and judicial economy necessitate the conclusion that subject matter jurisdiction over the entire action,

including both the wrongful death and survivorship claims, lies in Tribal Court under these circumstances.

PERSONAL JURISDICTION

Petitioner also argues that the Tribal Court does not have personal jurisdiction over her in this matter. Petitioner contends that, under the minimum contacts test, personal jurisdiction can only be found where there is such a substantial connection with the forum jurisdiction that the traditional notions of fair play and substantial justice are not offended. International Shoe Company v. Washington, 326 U.S. 310 (1945). Petitioner then argues that there is no fair play or substantial justice when a non-Indian is subjected to the jurisdiction of a tribal court over which she has no control or political

input. Petitioner also believes fair play is lacking because 1) the accident did not involve a tribal member; 2) the accident was not investigated by a tribal officer; 3) the accident was investigated by Montana authorities; 4) Gloria Mahler was appointed the personal representative of Christian Mahler's estate under Montana statutory authority; 5) the highway on which the accident occurred is a U.S. highway controlled by the State of Montana; and, finally, 6) members of the tribal court had excused themselves from the matter because of their involvement with and knowledge of Gloria Mahler (who is an employee of the Tribes and works closely with tribal court). Based on this, Petitioner asserts that "it is impossible for the non-Indian Petitioner to believe that the [grant of personal

jurisdiction] to the tribal court is an exercise of fair play and substantial justice." Petitioner's Brief at 27.

Petitioner's jurisdictional arguments, while facially interesting, are without substantial merit. Not only did the accident occur within the exterior boundaries of the Flathead Reservation, but also Petitioner resides on the Reservation. Unquestionably, the Tribes' have personal jurisdiction over an individual under those circumstances. However, Petitioner argues that her status as a non-Indian prevents her from participating in Tribal government and questions the competency and neutrality of the Tribal Court. Similar arguments have become a mainstay in attacking tribal jurisdiction over non-Indians and have been consistently rejected. See, e.g. Iowa Mutual, 480 U.S. 9 (1987);

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

From all of the foregoing, the court concludes that the Tribal Court of the Confederated Salish and Kootenai Tribes has both subject matter jurisdiction over Respondents' claims and personal jurisdiction over Petitioner. Accordingly, IT IS HEREBY ORDERED that Petitioner's motion for summary judgment is DENIED.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 29th day of January, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX D:

MEMORANDUM

OF THE UNITED STATES COURT

OF APPEALS FOR THE NINTH CIRCUIT

DATED JUNE 17, 1994

D-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYNETTE HINSHAW, Plaintiff-Appellant, v. GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased, Defendants-Appellees, and CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION, Intervenor-Appellee.	)	No. 93-35199 D.C. No. CV- 90-00071-CCL MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

D-2

Appeal from the
United States District Court
for the District of Montana
Charles C. Lovell,
District Judge, Presiding

Argued and Submitted March 7, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON,
Circuit Judges.

The issues in this case are whether the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has (1) subject matter jurisdiction over Gloria and Ken Mahler's wrongful death and survivorship claims,
which arose from an on-reservation automobile accident involving no members of the Confederated Tribes, and (2) personal jurisdiction over Lynette Hinshaw, the tortfeasor, a non-member resident of the reservation.

The district court denied Hinshaw's motion for summary judgment and held

that the Tribal Court has personal jurisdiction over Hinshaw and subject matter jurisdiction over the Mahlers' claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. SUBJECT MATTER JURISDICTION

A. Wrongful Death Claim

We review the district court's determination of jurisdiction *de novo*. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991). The Tribal Court's interpretation of tribal law is binding on this court. Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988), cert. denied, 490 U.S. 1110 (1989).

Clearly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving nonmembers. See Montana v.

United States, 450 U.S. 544, 565-66 (1981) (tribe retains civil authority over matters affecting the tribe); see also National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 855-56 (1985). Ordinance 40-A expressly provides that the Tribal Court and Tribal Government have concurrent jurisdiction over certain civil matters occurring on the reservation, including the operation of motor vehicles on public roads, and that all jurisdiction not expressly transferred remains with the Tribes. Tribal Ordinance 40-A (Revised) (May 5, 1965); Tribal Law and Order Code Ch. 1 § 2-3. See also Larivee v. Morigeau, 602 P.2d 563, 566-71 (Mont. 1979) (jurisdiction over torts arising from automobile accidents on the Flathead Reservation is concurrent between the State and the Tribes), cert. denied, 445

U.S. 964 (1980).

The Mahlers' action falls squarely within the scope of Tribal Ordinance 36-B. Tribal Law and Order Code, Ch. II, § 1(2) (1985). The accident occurred within the boundaries of the reservation. Gloria Mahler, Kenneth Mahler, and Hinshaw reside on the reservation and thus are "found" on the reservation, pursuant to section 1(2)(a)(1) & (2)(b). Hinshaw owned, used, and possessed a motor vehicle within the reservation, pursuant to section 1(2)(a)(2)(ii). Finally, Hinshaw's actions injured Gloria Mahler, a tribal member, pursuant to section 1(2)(a)(2)(iv).

The Tribes' jurisdiction has not been limited by treaty or statute, and the Tribes have not given up their authority to exercise jurisdiction over

actions such as the Mahlers'.

B. Survivorship Claim

The Tribal Court also has jurisdiction over the survivorship claim. Hinshaw argues that only the State has subject matter jurisdiction over the survivorship action because it is brought in a representative capacity, any damages belong to the estate, and the decedent was not a tribal member. We disagree.

The Tribal Court does not have concurrent probate jurisdiction with Montana. Tribal Appellate Court Opinion at 9, citing Tribal Code of Domestic Relations, Ch. V § 10(1). However, the Mahlers' tort action for personal injuries does not relate to the administration of the estate. A party wishing to bring both a wrongful death claim and a survivorship claim in a

Montana court must initiate a separate non-probate action. See Matter of Estate of Pegg, 680 P.2d 316, 322 (Mont. 1984) (wrongful death claim is not part of decedent's estate); Mont. Code Ann. §§ 27-1-513, 27-1-501(2) (1992) (a wrongful death claim and a survivorship claim must be combined in one legal action and brought in a representative capacity). Thus, initiation of the probate action did not initiate the Mahlers' tort actions in state court.

Furthermore, Hinshaw has cited no authority showing that the Tribal Court does not have jurisdiction over the survivorship claim. Iowa Mut. Ins. Co. v. LaPlantz, 480 U.S. 9 (1987) provides that "state courts are generally divested of jurisdiction as a matter of federal law" if the exercise of state-court jurisdiction "would interfere with

tribal sovereignty and self-government." Id. at 15. For us to hold otherwise would, in the words of the district court, "undermin[e] the authority of the Tribal Court to hear the wrongful death claim by effectively chilling Gloria Mahler's right to proceed in Tribal Court for that claim."

II. PERSONAL JURISDICTION

Hinshaw also argues that the Tribal Court lacks personal jurisdiction over her under the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

The Tribes' own case law provides that the fundamental requirement for personal jurisdiction is the existence of some relationship between the Tribes and the parties to the action such that it is reasonable for the Tribal Court to exercise control over the parties.

Estate of Bighorse, 15 Indian L. Rep. 6048, 6049 (1988); Tribal Appellate Court Opinion at 15. This also satisfies the requirements of International Shoe. Hinshaw, by living on the reservation, has purposefully availed herself of the privilege of conducting activities in the forum. The claim arises out of her forum-related activities, and the exercise of jurisdiction is reasonable because the Tribes have a special interest in exercising jurisdiction over those who have committed tortious acts within the reservation.

III. CONCLUSION

The decision of the district court is **AFFIRMED.**

(2)

Supreme Court, U.S.
FILED
OCT 13 1994
OFFICE OF THE CLERK

No. 94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents.

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

(as stated by Petitioner)

1. Did the Ninth Circuit abrogate case law [*Montana v. U.S.*, 450 U.S. 544, 564-65 (1981) and *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985)] concerning imposition of tribal court adjudicatory civil jurisdiction over non-Indians by relying upon dicta in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), already placed in question in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, at 247 n. 10 (1989), to impose civil adjudicatory jurisdiction over a non-member?

2. Did the Ninth Circuit err in allowing a tribal court civil adjudicatory jurisdiction over a survivorship tort claim involving a non-Indian and the estate of a non-Indian, premised upon a supplemental jurisdiction concept, when tribal adjudicatory jurisdiction was non-existent?

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STATEMENT OF THE CASE

Gloria Mahler is an enrolled member of the Confederated Salish & Kootenai Tribes of the Flathead Nation and she resides on the Flathead Reservation in Montana with her husband Kenneth. On July 4, 1986, their minor son Christian Devon Mahler was killed in a car/motorcycle accident which occurred within the exterior boundaries of the reservation. At the time of the accident Christian was residing with his parents on the reservation. Christian was not an enrolled member of the Tribes. The driver of the car was Lynette Hinshaw, a non-member, who resided with her parents within the exterior boundaries of the reservation.

Gloria and Kenneth Mahler commenced a wrongful death and survivorship action against Hinshaw in the Tribal Court. Hinshaw specially appeared and moved to dismiss for lack of subject matter jurisdiction. The Tribal Court and the Tribal Appellate Court upheld the jurisdiction of the Tribal Court. Hinshaw filed a "Petition for Review" which appeared to be a complaint for declaratory relief challenging Tribal Court jurisdiction in the United States District Court. The District Court and the Court of Appeals upheld the subject matter jurisdiction of the Tribal Court.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS FOLLOWED THE GUIDANCE GIVEN BY THE SUPREME COURT IN *NATIONAL FARMER'S UNION* AND *IOWA MUTUAL.*

In *National Farmer's Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985) the Supreme Court held that when the jurisdiction of a Tribal Court is challenged in a case against a non-member, the Tribal Court itself must determine its jurisdiction. In reaching that conclusion, the Court said:

> "Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S., at 855-56.

In *National Farmer's Union* the Court was not called on to determine the extent of Tribal Court jurisdiction over non-members, but it sharply distinguished between its prior decisions on criminal jurisdiction, namely *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) where the Court held that tribes do not have criminal jurisdiction over non-Indians who commit crimes on the reservation, and civil jurisdiction. That distinction had a historical basis in executive and Congressional policy. 471 U.S., at 854-55.

In *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) the Supreme Court reiterated the exhaustion requirement

holding that it required a resort to appellate remedies available in a tribal court system before resort to the federal courts. This decision was premised on a recognition of the federal government's policy of encouraging tribal self-government and that Indian tribes retain sovereignty over their members and territory to the extent that it has not been withdrawn by federal statute or treaty. 480 U.S., at 14. The Court observed that Congress has specifically encouraged the development of tribal legal systems and it reiterated the distinction between criminal and civil jurisdiction. 480 U.S., at 14-15. The Court went on to say:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. [citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.' *Merrion v. Jicarilla Apache Tribe,* 455 U.S. , at 149, n. 14." 480 U.S., at 18.

It is clear from a reading of the opinions of the Court of Appeals and the lower courts that they made a careful examination of tribal sovereignty and concluded that the tribes have in fact reserved as much power as they can to resolve legal disputes arising within their territory and affecting their members. Tribal Ordinance 40-A expressly creates a system of concurrent jurisdiction between the Montana state courts and the Tribal Court over certain

matters including the operation of motor vehicles on public roads within the reservation. Ordinance 36-B grants personal jurisdiction and subject matter jurisdiction to the Tribal Court, and the provisions of that ordinance clearly cover the accident involved in this case. *See, Appendix to Petition,* D-4 – D-5 (opinion of Court of Appeals) and C-12 – C-17 (text of Ordinance 36-B and 40-A).

The Court of Appeals found that the jurisdiction of the Tribes has not been limited by treaty or statute. *See, Appendix to Petition,* D-5. Moreover, in her petition the Petitioner has not identified any treaty or statute that limits the jurisdiction of the Tribal Court, and she did not identify any treaty or statute at any stage in this case. Since there is no federal limitation on the assertion of tribal court jurisdiction in this case and since the tribal ordinances assert jurisdiction to the fullest extent allowed by federal law, the Supreme Court's prior holdings in *National Farmer's Union* and *Iowa Mutual* compel a decision upholding the jurisdiction of the Tribal Court.

II. THE DECISIONS OF THE LOWER COURTS ARE BASED ON FACTS UNIQUE TO THE FLATHEAD RESERVATION AND SUPREME COURT REVIEW WOULD GIVE LITTLE GUIDANCE TO THE LOWER COURTS EXCEPT AS TO CASES ARISING ON THE FLATHEAD RESERVATION.

In upholding the subject matter jurisdiction of the Tribal Court, the Court of Appeals focused on Tribal Ordinance 36-B which asserts jurisdiction of the Tribal Court to the full extent allowed by federal law, and 40-A which creates a system of concurrent jurisdiction over

cases on specified subjects involving tribal members arising within the reservation. Ordinance 40-A is a response to a law enacted by the Montana Legislature in 1963, codified at Mont. Code Ann. sec. 2-1-302, which provides that in the event the Tribes adopt a resolution expressing a desire to subject their peoples and lands to the civil and criminal jurisdiction of the state, the governor would issue a proclamation to that effect. Ordinance 40-A was enacted on May 5, 1965 and created a system of concurrent jurisdiction and reserved to the Tribes all jurisdiction not expressly dealt with by the Ordinance. The governor issued his proclamation on October 8, 1965, extending the jurisdiction of the state to the reservation as stated in the Ordinance.

In *Larivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563, *cert. denied*, 445 U.S. 964 (1979), the Montana Supreme Court found, in a case filed by a non-member against a member (petitioner erroneously states in her petition at page 15 that *Larivee* involved two Indian parties but the Montana Supreme Court said it was a case of a non-Indian against an Indian, 602 P.2d, at 565), that the Ordinance did in fact create a system of concurrent jurisdiction between the state courts and the Tribal Court over torts arising from automobile accidents on the reservation.

The body of law on the concurrent jurisdiction of the state courts and Tribal Court over matters arising on the Flathead Reservation is unique to the Flathead Reservation. Neither Ordinance 40-A, the governor's proclamation, nor the holding of the Montana Supreme Court in *Larivee* have any applicability to any other reservation, either in Montana or in any other state. *See e.g., Larivee,*

supra, 602 P.2d, at 571 (specifically limiting the case to the Flathead Reservation). Nor has the Petitioner identified any similar situation anywhere else in the United States.

Moreover, what is particularly unique is that the Montana Supreme Court and the Court of Appeals for the Ninth Circuit, which includes Montana, have reached a consensus on the jurisdiction of the Montana state courts and the Tribal Court on matters arising within the Flathead Reservation. The Petitioner has not identified any sound policy reason why the United States Supreme Court should upset that consensus and interfere with a resolution that satisfies the interests of the State of Montana, the federal government, and the Tribes.

III. NOTHING IN *BRENDALE* OR ANY OTHER SUPREME COURT OPINION IS CONTRARY TO, LIMITS, OR MODIFIES THE GUIDANCE GIVEN BY THE SUPREME COURT IN *NATIONAL FARMER'S UNION* AND *IOWA MUTUAL*.

Petitioner argues that the Court of Appeals erroneously relied on language in *Iowa Mutual* to the effect that there is a presumption in favor of tribal court jurisdiction and that in so doing it failed to give a careful analysis of the extent to which tribal sovereignty had been altered, divested, or diminished. Petitioner claims that the presumption language is *dicta* and has been placed into question by the Court's holding in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

First, the Court of Appeals never mentioned the presumption language contained in *Iowa Mutual*. The case

was cited for other reasons in the discussion on the survivorship claim, which was a claim of Christian Mahler based on his injuries which passed to his estate when he died. The basis for tribal court jurisdiction is the wrongful death claim which is a claim of Gloria Mahler, personal to her, for the injury she suffered as a result of the death of her son. The District Court did mention the presumption language, but it also stated that it was required to carefully examine tribal sovereignty pursuant to *National Farmer's Union*, and then it embarked on an extended discussion of the tribal ordinances and the Montana Supreme Court's opinion in *Larivee*.

Second, there is no opinion of the Court in *Brendale*. The language cited by the Petitioner is taken from the opinion of a four justice plurality. The opinion in *Iowa Mutual* is an opinion of the Court joined in by eight justices, including three of the four in the *Brendale* plurality. The fourth justice was not on the Court when *Iowa Mutual* was decided. Further, the portion of the plurality opinion in *Brendale* relied on by Petitioner does not mention the presumption language. Instead it makes reference to statements about retained tribal sovereignty in both *Iowa Mutual* and *National Farmer's Union*.

The presumption language in *Iowa Mutual* is not *dicta*. That case is procedurally complex, but essentially a member sued a corporation and its insurance carrier for a tort occurring on the reservation. The carrier alleged lack of coverage as an affirmative defense and filed a diversity action in federal court seeking a declaration that its policy did not cover the incident. The practical effect of its diversity action, had it been allowed to go forward, would be to defeat tribal court jurisdiction to determine

the affirmative defense. The carrier argued that diversity jurisdiction overrode the federal policy of deference to the tribal courts. In direct response to that argument, the Court said that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and civil jurisdiction over such activities presumptively lies in the tribal courts. 480 U.S., at 17-18. A statement of the Court's rationale for ruling against a contention argued by one of the parties to a case is not *dicta.*

IV. PENDENT JURISDICTION IS COMPELLED BY THE FACTS OF THIS CASE, MONTANA LAW, PRINCIPALS OF JUDICIAL ECONOMY AND VIOLATES NO LIMITATION ON TRIBAL COURT JURISDICTION IDENTIFIED BY THE PETITIONER.

This case presents two claims. One is a wrongful death claim which is personal to Gloria Mahler and her husband. The second is a survivorship claim, which is the claim of Christian Mahler which passed to his estate upon his death. Under Montana law the personal representatives of the decedent's estate are required to bring both claims in one action and the survivorship action is to be brought for the benefit of the decedent's heirs, which in this case are Gloria and Kenneth Mahler. Mont. Code Ann. sec. 27-1-513. Not only does Montana law require one action, but so do notions of judicial economy and the avoidance of contradictory results.

Petitioner argues that jurisdiction of the survivorship claim is based on a supplemental jurisdiction theory provided for by 28 U.S.C. sec. 1367, which applies only to federal courts. Petitioner goes on to argue that supplemental jurisdiction is a creature of statute, and without the statute, no such jurisdiction would exist. Actually, that section was enacted in 1990. Before then claims could be brought in federal court under concepts of pendent jurisdiction and ancillary jurisdiction without statutory support. Pendant jurisdiction was not new in 1990.

Petitioner mischaracterizes the holdings of the lower courts when she states that a non-member can be sued in tribal court in a case over which the court lacks jurisdiction merely by joining it to a case over which it does have jurisdiction. In this case there is an obvious common nucleus of operative fact. Both claims are based on the negligent conduct of Lynette Hinshaw. The District Court said its decision was limited to the specific circumstances of this case. *See, Appendix to Petition,* C-25, C-27 – C-28. The District Court best addressed the Petitioner's argument when it said:

> "Exclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her rights as an individual litigant but also upon the lawful authority of the Tribal Court itself. If the state is granted exclusive jurisdiction over the survivorship claim, Gloria Mahler will be forced to either split the litigation between two separate courts with the resulting increase in costs and waste of judicial resources, or take the entire action, including the wrongful

death claim, into state court. Exclusive jurisdiction in state court of the survivorship claim in this situation would, therefore, constitute a de facto limitation on Tribal sovereignty by obstructing Gloria Mahler's right to proceed in Tribal Court because of practical and economic obstacles in her path." *Appendix to Petition*, C-25 – C-26.

CONCLUSION

The lower courts engaged in the careful analysis of the jurisdiction of the Tribal Court required by *National Farmer's Union*. The Petitioner has not identified any statute, treaty, executive policy, or judicial opinion which would divest the Tribal Court of the Flathead Reservation of jurisdiction of this case. The decisions of the lower courts demonstrate an effort to deal with tribal court jurisdiction issues in a careful manner on a case by case basis and without sweeping generalizations, which is what the Petitioner is asking the Supreme Court to do. The writ should be denied.

Respectfully submitted,

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October 13, 1994

Supreme Court, U.S.
FILED
OCT 14 1994
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No. 94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

vs.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR INTERVENOR-RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review of the Court are as follows:

1. Did the Ninth Circuit Court of Appeals correctly apply established principles of federal Indian law, and the guidance of *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and hold that the Tribal Court of the Confederated Salish and Kootenai Tribes have adjudicatory authority to resolve a wrongful death action brought by a Tribal member against a non-Indian arising from her tortious conduct which occurred on the Reservation.

2. In the unique circumstances of this case, where a Tribal member will be entitled to recovery in both a survivorship and wrongful death action for injuries resulting from Petitioner's tortious conduct on the Reservation, did the Ninth Circuit Court of Appeals correctly determine the Tribal Court of the Confederated Salish and Kootenai Tribes had adjudicatory jurisdiction over both actions.

PARTIES TO THE PROCEEDINGS

The names of the parties are set forth in the caption of the case.

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OPINIONS BELOW

The July 11, 1989, Order of the Trial Court of the Confederated Salish and Kootenai Tribes holding that it had adjudicatory jurisdiction over this wrongful death and survivorship action brought by a Tribal member arising out of the tortious conduct of Petitioner on the Flathead Indian Reservation (hereinafter "Reservation") is reprinted in Petitioner's Appendix to its Petition for Certiorari (hereinafter "Pet. App.") at A-1 through A-8. The February 2, 1990, Opinion of the Appellate Court of the Confederated Salish and Kootenai Tribes affirming the Tribal Trial Court's decision is reprinted in Pet. App. at B-1 through B-29.

The January 29, 1993, Opinion and Order of the United States District Court for the District of Montana, Missoula Division, affirming the Tribal Court's jurisdiction over this reservation affair is reprinted in Pet. App. at C-1 through C-31. The final decision, issued by the United States Court of Appeals for the Ninth Circuit in a Memorandum dated June 17, 1994, also affirmed the District Court and the Tribal Court decisions regarding Tribal adjudicatory jurisdiction over this tort action which arose on the Reservation, injured a Tribal member, and found that the Tribes have a "special interest in exercising jurisdiction over those who committed tortious acts within the reservation." is reprinted in Pet. App. at D-1 through D-9.

JURISDICTION

Jurisdiction over the final decision of the Ninth Circuit Court of Appeals lies at 28 U.S.C. § 1254(1). Tribal Respondents received the Petition by mail on September 16, 1994.

CONSTITUTION, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves the following ordinances and statutes reprinted in the Tribe's Appendix:

1) Constitution of the Confederated Salish and Kootenai Tribes (relevant portions).

2) Confederated Salish and Kootenai Tribes Ordinance 36-B, Amendment No. 4, governing civil jurisdiction of the Tribal Court.

3) Confederated Salish and Kootenai Tribes Ordinance 40-A, as revised, governing limited assumption of criminal and civil jurisdiction by the State of Montana.

4) Pub. L. 83-280, codified at 18 U.S.C. § 1162 (criminal); 28 U.S.C. § 1360 (civil) and 25 U.S.C. §§ 1321-1322.

5) M.C.A. 2-1-301 through 2-1-307, Pub. L. 83-280 jurisdiction.

STATEMENT OF THE CASE

Consistent with the accepted and usual course of judicial proceedings in *Williams v. Lee*, 358 U.S. 217 (1959),

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and Congress' policy encouraging self-determination and self-government, the Court below held that the Tribal Court had the authority to resolve a wrongful death and survivorship action brought by a Tribal member arising out of Petitioner's negligent conduct which occurred on the Reservation and resulted in the death of a Tribal descendant. In this case, all parties to the action are residents of the Flathead Indian Reservation, Montana, the Plaintiff is a Tribal member, and the automobile accident giving rise to the tort action occurred on the Reservation. Given that the situs of the harm occurred on the Reservation and resulted in direct injury to the personal and familial interests of a Tribal member, the lower courts all determined that the Tribes have adjudicatory jurisdiction to resolve this reservation affair.

COURSE OF PROCEEDINGS

In 1988, Gloria Mahler, a member of the Confederated Salish and Kootenai Tribes, and Kenneth Mahler, her non-Indian spouse (hereinafter "Mahlers") filed a Complaint against Lynette Hinshaw (hereinafter "Petitioner") in the Tribal Court of the Confederated Salish and Kootenai Tribes (hereinafter "Tribal Trial Court"). The complaint alleged that their son, Christian Mahler, a tribal descendant, was killed in an automobile/motorcycle collision as a result of the negligent conduct of Petitioner which occurred on the Reservation. Christian Mahler was not an enrolled member, but is entitled to

substantial tribal benefits and services based on his status as a Tribal descendant. Gloria Mahler, who is a Tribal member, was not present when the accident occurred but has suffered personal and severe damages as a result of her son's death. Petitioner specially appeared in the Tribal Court action to challenge the authority of the Tribal Court to resolve this reservation affair. The limited facts that have been determined in this case were found by the Tribal Trial Court and are reprinted at Pet. App. at A-2 through A-4. In its decision, the Tribal Trial Court found that it had subject matter jurisdiction over this tort action and personal jurisdiction over Petitioner. The Tribal Appellate Court affirmed the Trial Court's opinion. Even though the auto accident giving rise to these tort claims occurred in 1986, the only question that has been addressed is whether the Tribal Court has adjudicatory authority to resolve this dispute, the question on the merits of the negligence claims against Petitioner have not yet been tried.

Having exhausted her Tribal Court remedies, Petitioner petitioned the United States District Court for review of the Tribal Court's decision pursuant to *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which permits a federal district court to review a tribal court's determination of its civil adjudicatory jurisdiction over actions involving Indian and non-Indian parties, as is the case here. In a well-reasoned opinion, the United States District Court denied Petitioner's motion for summary judgment, and held that Petitioner properly complied with the requirement to exhaust tribal remedies, and held that the Tribal Trial

Court has subject matter jurisdiction over the wrongful death claim brought by a Tribal member as a result of an accident which occurred on the Reservation, and in the specific and unique circumstances of this case, that the Tribal Court had jurisdiction over the survivorship claim brought by a Tribal member on behalf of her deceased son.

The Ninth Circuit Court of Appeals unanimously upheld the District Court's determination of Tribal Court adjudicatory authority over this tort action holding that the Tribes jurisdiction had not been limited by treaty or statute, and the Tribes have not given up their authority to exercise jurisdiction over the Mahler's tort action, and that the Tribes have a special interest in exercising jurisdiction over those who commit tortious acts within the Reservation.

REASONS FOR DENYING PETITION

1. Petitioner Mischaracterizes the District Court's Determination of Tribal Jurisdiction Over the Survivorship Action Brought by a Tribal Member on Behalf of Her Son.

Petitioner confuses the unique circumstances of this case which involves both a wrongful death and survivorship action brought by a Tribal member and her non-Indian spouse for their damages resulting from the death of their son caused by the negligent conduct of Petitioner on the Reservation. The District Court properly rejected Petitioner's characterization of this action as involving claims arising from an automobile accident involving

only non-Indians, and found this characterization to be fundamentally misleading. *Hinshaw v. Mahler*, No. CV-90-71-M-CCL (D. Mont. 1993) (hereinafter "*Hinshaw*") Pet. App. at C-19. Petitioner's sole focus is on the status of herself and Christian Mahler, the victim of the auto accident. As the District Court correctly noted, she fails to recognize that the auto accident, which occurred on the Reservation, is an underlying event which gives rise to two separate and distinct tort claims. One for wrongful death brought by Gloria Mahler, a Tribal member and Kenneth Mahler, her non-Indian spouse for direct personal and familial injuries resulting from the death of their son. The second claim is a survivorship claim brought by Gloria and Kenneth Mahler as co-personal representatives, and beneficiaries of their son's estate. As the District Court stated, "[i]t is the difference between these two claims that is the crux of the jurisdictional issue before the Court." *Hinshaw*, Pet. App. at C-9. After a careful examination of the distinctions between these two claims, the District Court correctly concluded that

> Gloria Mahler's wrongful death claim is personal to her, and no provision of Tribal law requires that she bring it in any capacity other than that as an individual. Therefore, the wrongful death claim constitutes a tort action by a Tribal member for injuries personally suffered by that Tribal member as the result of an accident which occurred on the Flathead Reservation. The Tribal Court has jurisdiction over the claim notwithstanding the fact that the tribal member was not present at the scene of the accident.

Hinshaw, Pet. App. at C-22 through C-23.

Having concluded that the Tribal Court had jurisdiction over Gloria Mahler's wrongful death claim, the District Court stated that this must lead to the further conclusion that jurisdiction over the entire action must lie in Tribal Court. *Hinshaw*, Pet. App. at C-23 through C-28. This is based on the fact that a wrongful death claim has been brought by a Tribal member asserting personal injuries as the result of an accident which occurred on the Flathead Indian Reservation. The District Court reasoned that any wrongful death recovery belongs to Gloria Mahler as an individual and not to the estate of a non-member decedent. *Hinshaw*, Pet. App. at C-24. The District Court noted that although a survivorship claim is raised in a representative capacity, and concerns injuries suffered by Gloria Mahler's non-member deceased son, the Tribal Court "must retain jurisdiction over it lest its authority to hear the wrongful death claim is undermined." *Hinshaw*, Pet. App. at C-24 through C-25. The District Court further reasoned that "[e]xclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her rights as an individual litigant but also upon the lawful authority of the Tribal Court itself." *Hinshaw*, Pet. App. at C-25 through C-26.

The District Court's opinion implicitly recognizes that although Christian Mahler is not an enrolled member of the Tribes, he is part of the tribal community. As a Tribal descendant, Christian Mahler was treated as an "Indian" by the federal government and as such, was entitled to many of the benefits that are extended to Tribal members such as health care provided by the

Indian Health Service, 42 C.F.R. § 36.12 (1993), he could inherit trust or restricted property, 25 U.S.C. § 464, and was entitled to Indian education benefits, 25 U.S.C. § 2651(4)(B). Where a Tribal descendant has been injured by tortious conduct which occurs on the Reservation, and such injury also results in direct injury to a Tribal member, as is the case of Gloria Mahler, the Tribes have a significant interest in providing a forum where such injuries can be remedied. Rejecting Petitioner's arguments, the District Court determined that in the circumstances of this case, exclusive state court jurisdiction over the survivorship claim would constitute an impermissible intrusion by the State into Tribal affairs by undermining the authority of the Tribal Court to hear the wrongful death claim by effectively chilling the Mahler's right to proceed in Tribal Court for that claim. *Hinshaw*, Pet. App. at C-27.

Thus, the District Court's affirmance of Tribal Court jurisdiction over the survivorship action was limited to the specific factual circumstances of this case where such action was joined with a wrongful death action and both actions were brought by a Tribal member for injuries suffered as a result of the death of her son which arose out of an auto accident which occurred on the Reservation, and all parties to the litigation were Reservation residents. Since this case involves these two distinct claims, the District Court refused to answer the question of whether the Tribal Court would be able to assert jurisdiction over the survivorship action had it been brought alone. *Hinshaw*, Pet. App. at C-25. This question is left for another case under different factual circumstances which will have to be evaluated by conducting a

"careful examination" of tribal sovereignty and the extent to which it may be altered or divested.

In this case where the wrongful death action is joined with a survivorship action, the Tribe does have a strong interest in resolving this dispute which arises out of an automobile accident which occurred on the Reservation and which resulted in injury to a Tribal member. Since Christian Mahler was an unmarried minor at the time of his death, his parents will be the beneficiaries of damages recovered under both the wrongful death and the survivorship action. The Tribes, like all governments, have a strong interest in providing a forum to resolve disputes which involve reservation affairs, and also provide a forum where Tribal members can seek redress for injuries suffered as a result of negligent conduct of both Indian and non-Indians alike, and to deter such conduct by permitting parties to bring such actions in a Tribal forum.

Because the District Court, consistent with the decisions of this Court, and consistent with congressional policy, conducted a careful analysis of the Tribe's sovereignty and the extent to which it may have been altered or divested, certiorari is not warranted.

2. The Court Below Fully Considered and Correctly Decided the Issues and its Decision is Consistent with the Relevant Decisions of This Court and with Congressional Policy Encouraging the Development of Tribal Court Systems

A. Petitioner has failed to demonstrate that any Treaty provision or statute specifically divest the Tribes of its power to resolve this dispute which arose on the Reservation and directly injures the personal and familial interest of a Tribal member

The Court below addressed the question of whether the District Court properly held that the Tribes retain authority to resolve a tort action dispute which arose out of Petitioner's negligent conduct on the Reservation and resulted in the death of a Tribal descendant and resulted in direct personal injury to a Tribal member and her non-Indian spouse. The Petitioner's characterization of this case as only involving non-Indians is fundamentally misleading because Petitioner's tortious conduct on the Reservation resulted in injury to a Tribal member, regardless of whether the Tribal member was present when the accident occurred. *Hinshaw,* Pet. App. at C-18 through C-23.

Applying the well-settled analysis developed over 150 years of Indian-law jurisprudence discussing the nature of Tribal sovereign authority and applying this Court's recent pronouncements of these principles, the Court below followed this Court's refusal to automatically "foreclose tribal court jurisdiction over a civil dispute involving a non-Indian," and contrary to

Petitioner's assertions, carefully and diligently applied the analysis suggested by this Court that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Union, 471 U.S. at 855-856. The Court below also applied this Court's elaboration of this principle in *Iowa Mutual*, which recognized that a federal court's exercise of jurisdiction over matters relating to "reservation affairs" can impair the authority of tribal courts and acknowledged the established principle that

> [t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts *unless affirmatively limited by a specific treaty provision or federal statute.*

Iowa Mutual, 480 U.S. at 18 (emphasis added). This method of analyzing the extent to which a Tribe retains its inherent sovereignty to resolve a dispute which arises within its reservation and results in harm to a Tribal member, is consistent with the established principles of Federal Indian Law and is consistent with the *National Farmers Union* requirement that a Court conduct a "careful examination" of the extent and existence of such sovereignty on a case-by-case basis taking into account the relevant treaties, statutes, executive branch policy, and judicial decisions pertinent to the particular Tribe

whose jurisdiction is being challenged. The Court below used this framework in carefully determining the parameters of the Tribe's retained authority to resolve the unique circumstances of this dispute which arose on the Reservation and constitutes a "reservation affair."

The *National Farmer's Union* and *Iowa Mutual* principles, which the Court below applied, recognizes that the powers of Indian Tribes are "inherent powers of a limited sovereignty which has never been extinguished," F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945), that before the coming of Europeans, the tribes were self-governing sovereign communities. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). This Court has stated that "Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [they] are a good deal more than 'private voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544 (1975).

National Farmer's Union and *Iowa Mutual* also recognize the fundamental principle that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 152 (1980); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989). This principle was recently reiterated by this Court in *Iowa Mutual* by stating "Civil jurisdiction over such activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision

or federal statute." *Iowa Mutual*, 480 U.S. at 18. The areas where the Court has found such divestiture of Tribal powers has been very limited, for example: Indian Tribes as "domestic dependent nations" are divested of any power to determine their external relations, and therefore do not have the power to enter into diplomatic relations with foreign nations, *Worcestor v. Georgia*, 31 U.S. (6 Pet.) 515, 559-560 (1832), and Tribes may not alienate their lands freely, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

In the area of criminal jurisdiction over non-Indians, Tribal authority has been divested because it is inconsistent with the overriding interest of the national sovereignty of the United States. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978). In 1990, this Court in *Duro v. Reina*, 495 U.S. 676 (1990), extended *Oliphant* to hold that another area where Tribal authority was divested, was in asserting criminal jurisdiction over Indians who commit crimes on a reservation but who are not members of the Tribe who is asserting jurisdiction. The *Duro* Court, however, expressly distinguished the area of civil jurisdiction over non-members, stating that it recognized "broader retained tribal powers" in this area. *Id.* at 687-688. The *Duro* Court also acknowledged that some aspects of inherent sovereignty are territorial in nature.

Duro is important because Congress took unprecedented swift action and passed legislation clarifying and reaffirming the inherent sovereignty of tribal governments to exercise criminal jurisdiction over all Indians on their reservations. Congress clearly indicated its intent to limit the areas that Tribal power is divested over non-members and to strongly support and encourage tribal

self-government and authority over incidents which occur within reservation boundaries.[1] Congress also noted two fundamental maxims of Indian law: First, that Congress determines Indian policy, and second, Indian Tribes retain all rights and powers not expressly divested by Congress. H.R. CONF. REP. No. 261, 102nd Cong., 1st Sess. 3 (1991).

As the *Duro* Court noted, and Congress reaffirmed, the development of principles governing civil jurisdiction in Indian country has been markedly different than the development of rules dealing with criminal jurisdiction and *Oliphant* has not been extended to the questions of Tribal civil adjudicatory jurisdiction over non-Indians involving reservation affairs. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982 ed.); *Duro*, 495 U.S. at 687-688. Rather, "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed . . . ," *National Farmers Union*, 471 U.S. at 855, and Tribal authority over the activities of non-Indians on reservation lands is an important part of sovereignty, and that civil jurisdiction over such activities presumptively

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[1] Reaffirmance of Tribal authority over criminal activity by Indians, both Tribal members and non-members, can be explained by the serious nature of the conduct of a non-member Indian and the special interest a tribal government has in keeping peace on its reservation by providing a forum where such conduct can be deterred. This is similar to the circumstances of the case at hand, given the serious nature of Petitioner's conduct on the Reservation which resulted in death to a Tribal descendant, and injury to a Tribal member, and the Tribe's special interest in exercising jurisdiction over those who commit tortious acts within Reservation boundaries.

lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Iowa Mutual*, 480 U.S. at 18. Also, as the *Iowa Mutual* Court recognized the established principle that if "state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Id.* at 15. *See Williams v. Lee*, 358 U.S. 217 (1959).

The decision below is consistent with this well-settled area of law, and with this Court's recognition that Tribal Courts play a vital role in tribal self-government, *United States v. Wheeler*, 435 U.S. 313, 322 (1978), and that the Federal Government has consistently encouraged their development. The most recent congressional policy, the Indian Justice Support Act, enacted in 1993, provides for the enhancement of tribal courts by providing technical and financial assistance to tribes. 25 U.S.C. § 3501, et seq. (1993). In this Act Congress declared and reaffirmed that:

> . . . (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

> (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

25 U.S.C. § 3601. Congress also reaffirmed the "long-standing position . . . that Indian Tribes retain all rights and powers not expressly divested by the Congress." H.R. REP. No. 205, 103rd Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425.

In *National Farmers Union*, with facts similar to this case, this Court, recognizing the commitment of Congress to support self-determination and self-government, declined to exercise jurisdiction over a non-Indian's challenge of the Crow Tribe's authority to hear a tort action arising from an automobile and motorcycle accident at a state school within the exterior boundaries of the reservation until the Tribal court first had the opportunity to hear the challenge and make a determination regarding its adjudicatory jurisdiction. This deference afforded to Tribal Courts is in furtherance of Congress' commitment to tribal self-government and self-determination over reservation affairs. *Id.* at 856-857. *Iowa Mutual*, also involved facts similar to this case, where a member of the Blackfeet Tribe sued his employer, a Montana corporation, in Tribal Court. The nature of the suit was a tort action arising out of an automobile accident on the Blackfeet Reservation, and the Tribal member sought compensation for his personal injuries and for his wife's loss of consortium. The Tribal members also filed an action against the insurance company for bad faith refusal to settle. After the Tribal Court determined it had subject matter jurisdiction over these tort claims, the insurance company filed an action

in federal District Court alleging diversity of citizenship. On certiorari, this Court stated that a "federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts . . . ," *Iowa Mutual*, 480 U.S. at 15, and "that unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16. Accordingly, the *Iowa Mutual* Court held that the insurance company must exhaust available Tribal Court remedies before instituting an action in federal court. *National Farmers Union* and *Iowa Mutual* reaffirmed tribal sovereignty over tort actions involving non-Indians because the Court clearly anticipated circumstances where a Tribe would retain this authority, otherwise there would be no reason to require a non-Indian defendant to exhaust tribal remedies.

These decisions and congressional policies, like the decision below, recognize that an important attribute of self-determination and self-government is exercising authority over disputes that arise within the territorial boundaries of a reservation; that Indian Tribes have a strong interest in providing a forum for those injured by tortious conduct which occurs on the reservation and which impacts upon the interests of Tribal members. The deference afforded to Tribal Courts, in *National Farmer's Union* and *Iowa Mutual*, demonstrates the importance and role of Tribal Courts in resolving disputes between Indians and non-Indians on the reservation. These decisions also encourage Tribal Courts to maintain fair and efficient proceedings since federal courts may review

their determinations regarding subject matter jurisdiction.

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court recognized Tribal Court jurisdiction in an action brought by a non-Indian against an Indian for a reservation-based debt. This Court held that the appropriate forum to adjudicate the dispute was the Tribal Court because

> to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court stated that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," *Id.* at 65, and that Tribal courts are important mechanisms for protecting significant tribal interests. *Wheeler*, 435 U.S. at 322.

It is against this backdrop of tribal sovereignty that the court below followed established decisions of this Court and carefully analyzed the question of whether the Tribal Court of the Confederated Salish and Kootenai Tribes have the authority to resolve the wrongful death and survivorship claims brought by a Tribal member and

her non-Indian spouse arising out of an automobile accident which occurred on the Reservation, and resulted in the death of a Tribal descendant.

Petitioner concedes that the analytic framework in *National Farmers Union*, requiring a careful examination of the multitude of considerations regarding tribal civil jurisdiction, establishes the proper framework to analyze a Tribal Court's determination of its jurisdiction, Petition at 13. However, as she has argued throughout this entire review process, she simply disagrees with the result the lower courts have reached when they applied these established principles for determining whether the Tribes retain this important attribute of sovereignty. As noted above, the language regarding tribal presumptive authority in *Iowa Mutual* is consistent with *National Farmers Union* and with established principles of federal Indian law and congressional policy in determining the parameters of civil adjudicatory jurisdiction over non-Indians who commit torts on a reservation. In addition, there is no conflict of authority among the Circuit Court of Appeals on the questions presented for review.

Having failed to convince any of the lower court's of her arguments, Petitioner attempts to persuade this Court that this case involves only non-Indians, because Gloria Mahler, a Tribal member, was not present at the accident, thereby attempting to bring this case within the decisions of *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (plurality), which addresses tribal civil regulatory authority and not tribal adjudicatory authority. This characterization of the claim as involving only non-Indians is disingenuous and was

flatly rejected by the District Court as misleading, because although Gloria Mahler, a Tribal member, was not present when the accident occurred, she has suffered severe personal injury as a result of Petitioner's negligent conduct which occurred on the Reservation. Therefore, the claims being litigated involve an action between a Tribal member and a non-Indian. *Hinshaw*, Pet. App. at C-19. Moreover, both of these cases are distinguishable on the facts and the law.

Both *Montana* and *Brendale* involved a situation where a Tribe was attempting to assert civil regulatory jurisdiction over non-Indian use of fee lands on the reservation. In this case, the Tribes are not attempting to regulate the use of fee lands within the Reservation, but rather are asserting the right to adjudicate a dispute which arose within the Reservation boundaries and injured a Tribal member. In this case, Petitioner's presence and the serious nature of her conduct on the Reservation, which resulted in the death of a Tribal descendant, subjects her to the jurisdiction of the Tribal forum. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) (non-members presence and conduct on Indian lands conditioned by limitations the Tribe may choose to impose); *Duro v. Reina*, 495 U.S. at 706 (the commission of a crime on the reservation is all the "consent" that is necessary to allow a tribe to exercise criminal jurisdiction over the non-member Indian) (Brennan dissenting). In both *Montana* and *Brendale*, the Court conducted extensive findings of the demographics of the reservation, the general status of land ownership, and the current uses of the land in question, none of these types of findings of fact were determined or are of record in this case. These

types of factual findings are not relevant in determining adjudicatory jurisdiction over a tort action arising on the reservation. For example, although, *National Farmer's Union* involved a tort action arising out of an automobile and motorcycle collision on land owned by the State on the Crow Reservation, the land status was not a major consideration of the court in determining whether tribal exhaustion was required. 471 U.S. at 845; *e.g., Williams v. Lee*, 358 U.S. 217 (1959). In this case, there are no findings of fact regarding the land status where the accident occurred. Findings of Fact, *reprinted at* Pet. App. at A-2 through A-4.

Moreover, even if these cases apply, the exercise of Tribal Court jurisdiction in this case would be appropriate because the District Court's decision is consistent with the *Montana* and *Brendale* principle's that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health or welfare. The District Court correctly determined that the tortious conduct of Petitioner which occurred on the Reservation has a direct and serious impact on the health and welfare of a Tribal member, and hence the Tribe, and that exclusive state court jurisdiction over this matter would result in a serious impact on the political integrity of the Tribes by undermining its authority over reservation affairs. As the Court below noted, the Tribes have a special interest in asserting jurisdiction over those who commit tortious acts within the Reservation. As this Court noted in *Iowa Mutual*, unconditional access to

another forum impairs the authority of a Tribe over reservation affairs, therefore, seriously and demonstrably effecting the political integrity of the Tribes.

As this Court well knows, there is no bright-line test in analyzing a Tribe's adjudicatory jurisdiction, each case must be evaluated on its own unique factual circumstances giving rise to the cause of action, the nature of the tort, the location where the tortious conduct occurred, the status of the parties, as well as an evaluation of the treaties, statutes, executive branch policy and judicial decisions which define and provide the limits to a particular Tribe's sovereign authority. The court below, contrary to Petitioners assertions, did conduct the requisite "careful examination" of the unique circumstances of this case and of the relevant treaty, statutes, executive branch policy, and judicial decisions pertaining to the Tribes.

The unique political status of the Tribes was confirmed by the Treaty of Hellgate of July 16, 1855 (12 Stat. 975). The District Court noted that pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., the Tribes adopted a federally-approved constitution that affirms the right to develop a court system. Tribes Appendix at App. 1 through App. 5. The District Court also recognized this Court's consistent statement that Tribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development. *See Hinshaw*, Pet. App. at C-26 through C-27. *See also Iowa Mutual*, 480 U.S. at 14-15; *Wheeler*, 435 U.S. at 332; *Santa Clara Pueblo*, 436 U.S. at 65; *Williams*, 358 U.S. at 220-223. The District Court also noted that the Tribes have developed a comprehensive court system whose civil jurisdiction is defined by Tribal Ordinance

36-B (as amended), a federally approved set of laws and procedures entitled "The Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation." *Hinshaw*, Pet. App. at C-11 through C-13. Under this federally approved ordinance, Tribal Court jurisdiction extends to "the fullest extent possible not inconsistent with federal law," the Tribes may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:

. . .

> (1) All persons found within the Reservation.
>
> (2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:
>
> . . .
>
> (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
>
> . . .
>
> (iv) The injury or damage to property of the Tribes or a Tribal member.

Tribes Appendix at App. 6 through App. 7.

The District Court noted that although this Ordinance established that the Tribal Court is empowered to hear cases over which it has jurisdiction, it acknowledges that such jurisdiction cannot be inconsistent with federal law. *Hinshaw*, Pet. App. at C-13.

Pursuant to this Ordinance, the Tribal Court has subject matter and personal jurisdiction because Petitioner, as a resident of the Flathead Reservation at the time of the accident, is "found" on the Reservation within the meaning of Section 2(a)(1) of Chapter II of the Tribal Law and Order Code. The location of the accident, giving rise to the wrongful death and survivorship action, occurred within the exterior boundaries of the Reservation. Additionally, Petitioner owned, used, and/or possessed a motor vehicle in a manner which led to the death of Christian Mahler within the Reservation within the meaning of Section 2(a)(ii), Chapter II of the Tribal Law and Order Code. Moreover, Petitioner directly injured Gloria Mahler, a Tribal member within the meaning of Section 2(a)(iv), Chapter II of the Tribal Law and Order Code. Therefore, under the facts of this reservation affair, the Federal District Court correctly determined that Petitioner falls within the provisions of the Tribes' civil adjudicatory authority provided in Ordinance 36B, Chapter II of the Tribal Law and Order Code.

Tribal Court jurisdiction over this dispute is consistent with this Court's well-settled decisions providing for presumptive Tribal jurisdiction on reservation lands, unless affirmatively limited by specific treaty provision or federal statutes, and is consistent with this Court's decisions which have repeatedly recognized the federal policy favoring promotion of Tribal self-government. *Iowa Mutual*, 480 U.S. at 14 (1987).

Having found that subject matter jurisdiction exists under the presumptive inherent sovereignty of the Tribes which extends to reservation affairs, and that subject matter jurisdiction exists under Tribal ordinances and

case law, and having acknowledged the firmly entrenched policy favoring Tribal self-government of this Court, the question is whether federal law has expressly limited the Tribal Court's inherent adjudicatory authority to hear this matter involving a tort action brought by a Tribal member. The District Court properly concluded that Petitioner has failed to cite any treaty provision or statute that specifically divests the Tribe of its power to resolve this dispute which arises on the Reservation and directly injures the personal and familial interests of a Tribal member.

B. Public Law 280 which provides for concurrent state and Tribal jurisdiction over this type of tort action affirms tribal adjudicatory jurisdiction over this wrongful death and survivorship action.

The District Court correctly noted that the federal statutory law with the most impact on civil jurisdiction on the Flathead Reservation is Pub. L. 83-280.[2] However, rather than divest the Tribes of civil adjudicatory authority over a tort action such as in this case, Pub. L. 83-280 affirms Tribal authority in this area and serves as an important alternate basis for Tribal Court jurisdiction. Pub. L. 83-280 established a system of state and Tribal concurrent jurisdiction over criminal matters and limited

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[2] Public Law 83-280 commonly referred to as "Public Law 280," is codified at 18 U.S.C. § 1162 (criminal); 28 U.S.C. § 1360 (civil); and 25 U.S.C. §§ 1321-1322.

civil adjudicatory matters in "Indian Country".[3] Public Law 280 mandated the limited transfer of adjudicatory jurisdiction in specific civil areas and criminal jurisdiction over certain Indian reservations. This had mandatory application to six states, and permitted other states, "option" states, to assume enumerated aspects of jurisdiction voluntarily, with the consent of tribes. 25 U.S.C. §§ 1321-1322; 18 U.S.C. § 1162; and 28 U.S.C. § 1360. Tribes Appendix at App. 12 through App. 19. Montana is an "option" state.

In 1963, the Montana Legislature enacted legislation authorizing the State to assume limited "280" jurisdiction over tribal members on the Flathead Indian Reservation. §§ 2-1-301 through 2-1-307, M.C.A. Tribes Appendix at App. 20 through App. 24. This state legislation was permissive, and in accordance with federal law, it provided that "280" jurisdiction could only occur with the approval of tribes.

In 1965, the Tribal Council of the Confederated Salish and Kootenai Tribes enacted Tribal Ordinance 40-A

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[3] "Indian country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151. This definition is also used for purposes of civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427, n. 2 (1975). Congress expressly provided that "Indian Country" includes fee patented lands and rights-of-way through reservations.

(revised), which is codified in the Tribes' Law and Order Code. This ordinance authorized State and Tribal concurrent civil adjudicatory jurisdiction in eight enumerated areas, including the "operation of motor vehicles on public streets, alleys, roads, and highways." Tribes Appendix at App. 25 through App. 26.

Public Law 280, however, did *not* extinguish nor transfer any authority the Tribes have due to their sovereign status nor did it specifically extinguish any tribal court jurisdiction. *Native Village of Venetie v. Alaska*, 918 F.2d 797, 809-810 (9th Cir. 1990). Subsection 2(a) of Tribal Ordinance 40-A expressly provides that concurrent jurisdiction remains with the Tribal Court in these eight enumerated areas of civil adjudicatory jurisdiction. Tribes Appendix at App. 26. To protect the Tribes' governmental authority and to limit the applicability of concurrent jurisdiction, subsection 2(e) of Tribal Ordinance 40-A expressly provides that if the Ordinance is interpreted to extend jurisdiction beyond what is specifically enumerated, the entire ordinance shall become void and have no effect. Tribes Appendix at App. 27.

This limited consent to civil adjudicatory jurisdiction over the "operation of motor vehicles" did not divest Tribal civil jurisdiction over *tort* actions arising on the Reservation involving Indians.[4] *California v. Cabazon*

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[4] The District Court properly rejected Petitioner's argument below that this language regarding Tribal and State concurrent adjudicatory authority over "the operation of motor vehicles upon public streets, alleys, roads, and highways" divested the Tribe's authority to regulate motor vehicle traffic and somehow impacts the Tribe's authority to resolve this

Indians, 480 U.S. 202, 207-212 (1987) (Pub. L. 280 is not a divestiture statute). *Duro* legislation, H.R. CONF. REP. No. 261, 102nd Cong., 1st Sess. 5 (1991) ("the delegation of Federal authority to state governments under Pub. L. 83-280 is generally concurrent with tribal governments jurisdiction").

The Montana Supreme Court's interpretation of state and tribal law regarding "280 jurisdiction" is that adjudicatory jurisdiction over torts involving auto accidents on the Flathead Reservation is concurrent between the Tribes and the State. *Larrivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980) ("*Larrivee*"). The *Larrivee* Court held that because the Salish and Kootenai Tribes consented to limited concurrent civil jurisdiction with the State of Montana, in accordance with Pub. L. 280, and because one of the areas of concurrence involved the "Operation of Motor Vehicles Upon the Public Streets, Alleys, Roads and Highways," the state court could exercise civil jurisdiction over actions arising out of auto accidents involving Indians on the Reservation. The *Larrivee* Court affirmed that jurisdiction was concurrent between Montana and the Tribes over the tort action.[5]

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dispute which arises out of Petitioner's negligent conduct. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), a seminal Public Law 280 case, the Supreme Court rejected Minnesota's efforts to tax and regulate personal property of tribal members based on the State's claim that Public Law 280 conferred broad civil regulatory jurisdiction to states.

[5] The Montana Supreme Court has also held, that in non-Public Law 83-280 reservations in Montana, the state court exercise of adjudicatory jurisdiction over an action brought by a non-Indian insurer and a tribal member over damages to an

Therefore, rather than support Petitioner's claim that the Tribe's jurisdiction over this tort action is diverted, the limited system of concurrent jurisdiction under Public Law 280 supports the decision below that the Tribes still retain this important attribute of sovereignty, and therefore, certiorari is not warranted.

CONCLUSION

There are no conflicting decisions among the Circuit Court of Appeals on this matter, and it is not of such importance as to warrant review. There is no bright-line rule for determining tribal adjudicatory authority, each case must be examined according to its unique facts and the multitude of considerations relevant to Tribal sovereignty, this case is consistent with the accepted and usual course of judicial proceedings. The District Court correctly and diligently applied the principles of *National Farmers Union* and *Iowa Mutual*, and well-settled principles of Indian law and congressional policy, to the unique circumstances of this case and determined the Tribal Court retained this important attribute of sovereignty to resolve this dispute which arose out of Petitioner's negligent conduct on the Reservation.

For the foregoing reasons, certiorari should be denied.

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insured automobile on a reservation would be inappropriate because it would interfere with tribal sovereignty and the right of tribal self-governance. *Milbank v. Mutual Insurance Co.*, 705 P.2d 1117, 1120 (Mont. 1985).

Respectfully submitted this 14th day of October, 1994.

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APPENDIX 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

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CONSTITUTION AND BYLAWS OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION MONTANA

+

APPROVED OCTOBER 28, 1935

(Seal)

ARTICLE VI – POWERS AND DUTIES OF THE TRIBAL COUNCIL

SECTION 1. The Tribal Council shall have the power, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached Bylaws;

(a) To regulate the uses and disposition of tribal property, to protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian arts, crafts, and culture, to administer charity; to protect the health, security, and general welfare of the Confederated Tribes.

(b) To employ legal counsel for the protection and advancement of the rights of the Flathead Confederated Tribes and their members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To negotiate with the Federal, State, and local governments on behalf of the Confederated Tribes, and to

advise and consult with the representatives of the Departments of the Government of the United States on all matters affecting the affairs of the Confederated Tribes.

(d) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands and tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other agency of the Government, *provided* that no tribal lands shall be sold or encumbered or leased for a period in excess of five years, except for Governmental purposes.

(e) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Confederated Tribes, prior to the submission of such estimates to the Congress.

(f) To manage all economic affairs and enterprises of the Confederated Tribes in accordance with the terms of a charter to be issued by the Secretary of the Interior.

(g) To make assignments of tribal lands to members of the Confederated Tribes in conformity with article VIII of this Constitution.

(h) To appropriate for tribal use of the reservation any available applicable tribal funds, provided that any such appropriation may be subject to review by the Secretary of the Interior, and *provided, further,* that any appropriation in excess of $5,000 in any one fiscal year shall be of no effect until approved in a popular referendum.

Amended See p.13-14

(i) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would

provide for assessments or license fees upon nonmembers doing business within the reservation, or obtaining special rights or privileges, and the same may also be applied to members of the Confederated Tribes, provided such ordinances have been approved by a referendum of the Confederated Tribes.

(j) To exclude from the restricted lands of the reservation persons not legally entitled to reside thereon, under ordinances which may be subject to review by the Secretary of the Interior.

(k) To enact resolutions or ordinances not inconsistent with article II of this Constitution governing adoptions and abandonment of membership.

(l) To promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Confederated Tribes, and providing for the maintenance of law and order and the administration of justice by the establishment of an Indian Court, and defining its powers and duties.

(m) To purchase land of members of the Confederated Tribes for public purposes under condemnation proceedings in courts of competent jurisdiction.

(n) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the Confederated Tribes by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior.

(o) To charter subordinate organizations for economic purposes and to regulate the activities of all cooperative and other associations which may be organized under any charter issued under this Constitution.

(p) To regulate the inheritance of real and personal property, other than allotted lands, within the Flathead Reservation, subject to review by the Secretary of the Interior.

(q) To regulate the domestic relations of members of the Confederated Tribes.

(r) To recommend and provide for the appointment of guardians for orphans, minor members of the Confederated Tribes, and incompetents subject to the approval of the Secretary of the Interior, and to administer tribal and other funds or property which may be transferred or entrusted to the Confederated Tribes or Tribal Council for this purpose.

(s) To create and maintain a tribal fund by accepting grants or donations from any person, State, or the United States.

(t) To delegate to subordinate boards or to cooperative associations which are open to all members of the Confederated Tribes, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

(u) To adopt resolutions or ordinances to effectuate any of the foregoing powers.

SECTION 2. Any resolution or ordinance which by the terms of this constitution is subject to review by the

Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior who may, within 90 days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the Council of such action: *Provided,* That if the Superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten days after its enactment, he shall advise the Council of his reasons therefor, and the Council, if such reasons appear to be insufficient, may refer it to the Secretary of the Interior, who may pass upon same and either approve or disapprove it within 90 days from its enactment.

SECTION 3. The council of the Confederated Tribes may exercise such further powers as may in the future be delegated to it by the Federal Government, either through order of the Secretary of the Interior or by Congress, or by the State Government or by members of the Confederated Tribes.

SECTION 4. Any rights and powers heretofore vested in the Confederated Tribes but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the members of the Confederated Tribes through the adoption of appropriate bylaws and constitutional amendments.

APPENDIX 2

RESOLUTION NO. 85-188

Ordinance No. 36-B
Amend No. 4

ORDINANCE
OF THE TRIBAL COUNCIL OF
THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE
FLATHEAD RESERVATION

AN AMENDMENT TO ORDINANCE NO. 36-B AMENDING CHAPTER II, SECTIONS 1 and 5, OF THE TRIBES' LAW AND ORDER CODE.

BE IT ENEACTED [sic] by the Tribal Council of the Confederated Salish and Kootenai Tribes:

WHEREAS, Chapter II of the Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Ordinance No. 36-B) pertains to civil jurisdiction and other civil matter [sic]; and

WHEREAS, There is a need to further clarify the civil jurisdiction of the Tribes and Tribal Courts set forth in Section 1 of Chapter II of said Code; and

WHEREAS, There is also a need to further clarify and describe the service of process procedures set forth in Section 5 of Chapter II of said Code, and

WHEREAS, Such amendments are timely in light of the United States Supreme Court's opinion in *Farmer's Union v. Crow Tribe*, ___ U.S. ___ (1985).

NOW THEREFORE, BE IT RESOLVED:

1. That Chapter II, Section 1, Paragraph 2, of the Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Ordinance 36-D) is hereby amended by deleting the original language and inserting the following language in lieu thereof:

"2. a. To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. To the fullest extent possible not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to an [sic] include, but not by way of limitation, the following:

(1) All persons found within the Reservation.

(2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:

(1) The transaction of any business within the Reservation;

(ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;

(iii) The entering into of any type of contract within the Reservation or wherein any aspect of any contract is performed within the Reservation;

(iv) The injury or damage to property of the Tribes or a Tribal member.

b. As used in this section, "person" means an individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity. Nothing in this Chapter waives any aspect of the Tribes' sovereign immunity or related privileges."

2. That Chapter II, Section 5, of the same Code is hereby amended by deleting the original language and inserting the following language in lieu thereof:

"SECTION 5. SERVICE

1. Service of Process.

a. Whenever possible, the summons and complaint shall be served on the defendant by personal service. Personal service of process shall be made by a law enforcement officer or by any person over the age of 18 who is not a party to the action.

b. If, after diligent search and inquiry, the defendant can not be personally served, process may be served (within or outside the Reservation) by mail. Service by mail shall be by registered or certified mail with return receipt requested. All service by mail must be confirmed by the Court at the time of trial or at the time of the entering of the default judgment, and must be supported by an affidavit from the plaintiff. The affidavit shall include the original return receipt, a description of documents served on the defendant, and a statement that a diligent

search and inquiry has been made to serve the defendant personally.

c. If, after diligent search and inquiry, the defendant can not be served personally or by mail, process may be served by publication.

2. *Service by Publication.*

a. The plaintiff shall file an affidavit with the Clerk of Court prior to any service by publication. This affidavit shall include a statement that the plaintiff has, after diligent search and inquiry, been unable to effect service of process on the defendant. After receiving such an affidavit, the Clerk of Court shall issue a Summons by Publication authorizing service by Publication. The Summons by Publication shall be valid for 60 days from the date of issuance, and thereafter void. The other requirements of service by publication are as follows:

(1) The Summons by Publication must be published in two consecutive issues of the Tribal newspaper, and one or more other newspapers published within the Reservation boundaries at least once each week for three consecutive weeks. The Summons by Publication shall contain: the name of the Court and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address; state that the defendant has 21 days after the last date of publication to answer and defend; inform defendant that failure to

answer and defend will result in judgment by default; explain the object of the complaint; and, in an action in which the title to or any interest in or lien upon real property is involved, the publication shall also contain a general or legal description of the property involved.

(2) Service by publication is complete on the date of the last publication of the summons.

(3) At the time of trial or entering of the default judgment, the plaintiff shall submit evidence to the Court that the foregoing service by publication procedures have been satisfied.

3. Service outside the Reservation.

Where service upon any defendant can not be made within the Reservation, service of process outside the Reservation may be made personally, by mail, or by publication as described in this Section, with the same force and effect as though service had been made within the Reservation."

3. That copies of the amendment shall be printed in a manner that allows it to be inserted into the Tribes' Law and Order Code. Such copies shall be distributed to appropriate persons.

CERTIFICATION

The foregoing Ordinance was duly adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation on the 9th day of August,

1985 with a vote of 9 for, 1 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Section 1 (a), (l), (n), (t), and (u) of the Tribes' Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984) as amended.

/s/ James H. Steele
Vice Chairman,
Tribal Council

ATTEST:

/s/ Joseph M. Dupuis
Executive Tribal Secretary

APPENDIX 3

18 U.S.C. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

SUBCHAPTER III – JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

25 U.S.C. § 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

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28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate,

in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX 4

Part 3
Jurisdiction on Indian Lands
(MCA)

Part Cross-References

State-tribal cooperative agreements, Title 18, ch. 11.

2-1-301. Assumption of criminal jurisdiction of Flathead Indian country. The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session).

History: En. Sec. 1, ch. 81, L. 1963; R.C.M. 1947, 83-801.

2-1-302. Resolution of Indian tribes requesting state jurisdiction – governor's proclamation – consent of county commissioners. (1) Whenever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.

(2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, and there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes.

History: En. Sec. 2, Ch. 81, L. 1963; R.C.M. 1947, 83-802; amd. Sec. 2, Ch. 184, L. 1979.

2-1-303. Date of assumption of jurisdiction – application of state law in Indian country. Sixty days from the date of issuance of the proclamation of the governor as provided for by 2-1-302, the state of Montana shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state. The criminal and/or civil laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

History: En. Sec. 3, Ch. 81, L. 1963; R.C.M. 1947, 83-803.

2-1-304. Rights, privileges, and immunities reserved to Indians. Nothing in this part shall:

(1) authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States;

(2) authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto;

(3) confer jurisdiction upon the state of Montana to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or

(4) deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, fishing, or the control, licensing, or regulation thereof.

History: En. Sec. 4, Ch. 81, L. 1963; R.C.M. 1947, 83-804.

Cross-References

Compact with the United States – reaffirmation of state disclaimers concerning Indian land, Art. I, Mont. Const.

2-1-305. Indian culture protected. Nothing in this part shall deprive the Indian tribe, band, or community from carrying on its age-old tribal dances, feasting, or customary Indian celebrations or in any way try to destroy the Indian culture.

History: En. Sec. 5, Ch. 81, L. 1963; R.C.M. 1947, 83-805.

Cross-References

Educational goal to preserve Indian cultural integrity, Art. X, sec 1(2), Mont. Const.

2-1-306. Withdrawal of consent to state jurisdiction. (1) No sooner than 6 months after April 24, 1993, and after consulting with local government officials concerning implementation, the Confederated Salish and Kootenai tribes may, by tribal resolution, withdraw consent to be subject to the criminal misdemeanor jurisdiction of the state of Montana. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

(2) The Confederated Salish and Kootenai tribes may, by separate resolution, withdraw consent to be subject to those areas of civil jurisdiction of the state of Montana that are delineated in tribal ordinance 40-A (revised and enacted May 5, 1965). The withdrawal is limited to those delineated areas of civil jurisdiction, agreed upon in writing by the governor after consultation with the attorney general and officials of affected local governments. The tribes shall initiate this process by sending a certified letter to the governor. After consultation and execution of a written agreement between the governor and the tribes, the agreed-upon civil areas must be incorporated into a tribal resolution to be enacted by the tribes. Within 6 months after receipt of the tribal resolution, the governor shall issue a proclamation to that effect that reflects the terms of the written agreement.

(3) Subsections (1) and (2) do not alter the existing jurisdiction or authority of the Confederated Salish and Kootenai tribes or the state of Montana, except as expressly provided for in subsections (1) and (2).

History: En. Sec. 6, Ch. 81, L. 1963; R.C.M. 1947, 83-806; amd. Sec. 1, Ch. 542, L. 1993.

Compiler's Comments

1993 Amendment: Chapter 542 substituted present section regarding withdrawal of consent to state jurisdiction for former section that read: "Any Indian tribe, community, band, or group of Indians that may consent to come within the provisions of this part may within 2 years from the date of the governor's proclamation withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within 60 days after receipt of such resolution, the governor shall issue a proclamation to that effect." Amendment effective April 24, 1993.

2-1-307. Service of process. All legal process of the state, both civil and criminal, may be served upon persons and property found on any Indian reservation in all cases where the United States has not exclusive jurisdiction.

History: En. Sec. 41, Pol. C. 1895; re-en. Sec. 22, Rev. C. 1907; re-en. Sec. 21, R.C.M. 1921; re-en. Sec. 21, R.C.M. 1935; R.C.M. 1947, 83-103(part).

APPENDIX 5

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE
FLATHEAD RESERVATION, MONTANA

Tribal Ordinance 40-A (Revised)

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, AMENDING SECTIONS AND CHAPTERS OF THE "ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, NO. 36-A (Revised) ADOPTED MAY 23, 1962", HEREINAFTER REFERRED AS THE "OFFICIAL CODE OF ORDINANCES", AS FOLLOWS:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:

That Chapter 1, Section 2, Jurisdiction, of the Official Code of Ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph three to read as follows:

"Subsection 1: Subject to the conditions and limitations expressed in Subsection 2 hereof, the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory School Attendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

(f) Adoption Proceedings (With consent of the Tribal Court)

(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns with [sic] the Flathead Indian Reservation.

Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with Federal Courts) with the Tribal Court and in the Tribal Government of all matters referred to in Subsection 1; and any matter initiated in either a state or Federal Government Court or the Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) No person, once convicted of a crime falling within the jurisdiction of the State or

Federal Government, or the Tribes pursuant to this ordinance, shall be punished for the identical act in the courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.

(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pursuant to Article IX of the Constitution of the Confederated Tribes, and if a referendum is authorized and this ordinance disapproved by a majority under the conditions set forth in Article IX this ordinance shall be void and of no effect to transfer any jurisdiction to the State of Montana and its judicial system.

(d) All jurisdiction of the Confederated Tribes under their Constitution and Bylaws, and ordinances enacted pursuant thereto, and of the Federal Government under the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively to the same extent as if this ordinance had not been adopted.

(e) If any provision of the Act of the Montana Legislature of February 27, 1963, Laws of Montana 1963, Vol. 1 Chap. 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend a jurisdiction more extensive than set forth herein, or if any condition herein be not complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning.

(f) In the event of any alleged violation of the Civil Rights of Tribal members by operation of this ordinance, the Tribal Council reserves the right to conduct an independent investigation of the alleged act; to seek redress in a court of competent jurisdiction; and to review the ordinance upon the validation of any such alleged offense.

Provided further that any sentences or convictions, lawfully inflicted under the provisions of this ordinance, shall not be affected by subsequent cancellation or voidance of this ordinance."

All ordinances and parts of ordinances in conflict herewith are hereby repealed (specifically Tribal Ordinance 40-A approved May 19, 1964).

CERTIFICATE

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana pursuant to the Act of the United States Congress of August 15, 1953; 67 Stat. 588, as amended (13 U.S. Code Section 1162; 28 U.S. Code Section 1360); the Act of the Legislature of Montana, February 27, 1963, Laws of Montana 1963, Vol. 1, Chap. 81, p. 170; and Article VI, Sec. 1, subsections (c), (n) and (q) of the Constitution of the Confederated Tribes, pursuant to Section 16 of the Indian Reorganization Act of

June 18, 1934, 48 Stat. 984, the 5th day of May, 1965, by a vote of 7 for, 0 against, and 0 not voting.

/s/ Walter W. McDonald
Walter W. McDonald
Chairman, Tribal Council

ATTEST: /s/ Alvin E. Sloan
Alvin E. Sloan
Secretary

Supreme Court, U.S.
FILED
OCT 26 1994
OFFICE OF THE CLERK

94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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No. 94-510

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

The Respondents and the Intervenor avoid any discussion of this Court's ruling in *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408, at 427 n.10 (1989), pertaining to the inapplicability of the presumption language of *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and continue to attempt to avoid the sovereignty issue by reliance on a presumption of jurisdiction

that this Court has specifically ruled is "misplaced." *See* Petitioner's Brief, pp. 12-13.

In regard to the supplementary jurisdictional issue, the Respondents' and the Intervenor's briefs are void of any statutory or case authority supporting the extension of supplemental jurisdiction to tribal courts.

I. The Court Should Grant the Petition to Resolve the Question as to the Parameters of Tribal Courts' Civil Adjudicatory Jurisdiction Over Non-Indians Found on the Reservation.

A. *Iowa Mutual* Presumption Is Without Authority and Results in Avoidance of Analysis.

Respondents' and Intervenor's arguments highlight the very reason that this Court should grant the Petition. Both the Respondents and the Intervenor Confederated Salish and Kootenai Tribes of the Flathead Nation ("Tribe") rely heavily on the utilization of a presumption from *Iowa Mutual*, to support their argument that tribal jurisdiction exists over a non-Indian for civil adjudicatory jurisdiction. Respondents' Brief, p. 3; Intervenor's Brief, p. 11. The Respondents and Intervenor do not address this Court's ruling that reliance upon the presumption language of *Iowa Mutual* is misplaced, as this Court has already determined in *Brendale*, 492 U.S. 408, 427 n.10 (1989), *see* Petitioner's Brief, pp. 12-13.

The Intervenor attempts to circumvent the *Brendale* abrogation of the *Iowa Mutual* presumption language by arguing that *Brendale* and *Montana v. United States*, 450

U.S. 544 (1981), should be distinguished because the decisions involved civil regulatory jurisdiction over non-Indian use of fee lands on the Reservation. Intervenor's Brief, p. 20. No such distinction concerning civil jurisdiction over non-Indians is present in any of this Court's decisions pertaining to tribal court jurisdiction over non-Indians. The Intervenor proceeds to argue that, without reference to the demographics of the Flathead Indian Reservation, this Court lacks the necessary factual information to reach a decision concerning civil adjudicatory jurisdiction. Intervenor's Brief, pp. 20-21. The demographics of the Flathead Reservation are potentially important to this Court's understanding of the significant daily conflicts that exist concerning the parameters of jurisdictional authority between the State of Montana and the Tribal Court. This Court has addressed the demographics of the Flathead Reservation in a previous decision. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation*, 425 U.S. 463 (1976). Therefore, by judicial notice, this Court should be apprised of the history of the Flathead Reservation and the significant non-Indian activity within the external boundaries of the Flathead Reservation.

> In 1855 an expanse of land stretching across the Bitter Root River Valley and within the then Territory of Washington was reserved for "the use and occupation" of the "confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians," by the Treaty of Hell Gate, which in 1859 was ratified by the Senate and proclaimed by President Buchanan. 12 Stat. 975. Slightly over half of its 1.25 million acres is now owned in fee, by both Indians and non-Indians;

most of the remaining half is held in trust by the United States for the Tribe. Approximately 50% of the Tribe's current membership of 5,749 resides on the reservation and in turn composes 19% of the total reservation population. Embracing portions of four Montana counties – Lake, Sanders, Missoula, and Flathead – the present reservation was generally described by the District Court:

> The Flathead Reservation is a well-developed agricultural area with farms, ranches, and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.
>
> As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction. 392 F. Supp. 1297, 1313 (1975).

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 466 (1976). Since 1975, the

demographics of the Reservation have not significantly changed. The tribal members continue to be a minority within the Reservation. The extent and parameters of jurisdictional authority of the tribal court and the state court in civil matters related to non-Indians remains uncertain and undefined. It is the justifiable expectation of non-Indians within the Reservation that their affairs will be governed by the state judicial system. However, the tribal court's position in regard to civil adjudicatory matters is that it has jurisdiction over all matters relating to the Reservation. *See* citation to Tribal Law and Order Code, Intervenor's Appendix 2, App. 7.

B. Citation to Public Law 280 Authority is Inapplicable.

The Tribe, as the Intervenor, argues extensively in its brief in opposition concerning Public Law 280 (18 U.S.C. § 1162) relating to jurisdictional authority acquiesced by the tribes to the State of Montana. Public Law 280 does not have application to the parameters of tribal civil adjudicatory jurisdiction over non-Indians. Public Law 280 and the ordinances cited by the Intervenor in its appendix are inapplicable to the issue before this Court for the reason that Public Law 280 relates to the exercise of criminal jurisdiction over non-Indians by the State of Montana. Public Law 280 does not regulate civil adjudicatory jurisdiction of tribal courts over non-Indians.[1] The

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[1] The title of Public Law 280 (18 U.S.C. § 1162) in Intervenor's Appendix 3, App. 12, clearly provides that the focus of the statute is state jurisdiction over Indians and not the

Tribe concedes that federal law controls. "To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. . . . " Ordinance No. 36-B, Amendment No. 4, *see* Intervenor's Brief, Appendix 2, App. 7. Therefore, the Tribe concedes that federal law, in this instance federal case law, will control the extent of tribal civil adjudicatory powers. The parameters on the Tribe's adjudicatory powers over non-Indians must be established by case law that provides guidance for the daily conflicts that exist in the judicial processes of the Tribe and the State of Montana.

C. Tribal Sovereignty Unaffected by Activities of the Litigants.

The Respondents and the Tribe beg the question by arguing that a careful analysis of tribal sovereignty was made and that it was concluded that Tribal sovereignty was affected since an Indian, albeit the mother of the decedent, was vicariously injured and therefore tribal sovereignty was automatically in question.[2]

The argument that sovereignty is automatically at issue circumvents the real question that must be addressed, *i.e.*, to what extent would tribal sovereignty be altered, divested, or diminished in the event that the

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converse: "State jurisdiction over offenses committed by or against Indians in the Indian country."

[2] The facts are uncontroverted that the sole occupant and driver of the vehicle, Lynette Hinshaw, and the motorcyclist, Christian Mahler, were non-Indians and were the only individuals involved in the collision that precipitated this litigation.

present litigation were to be adjudicated in state court? As noted in the petition, the criteria of *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985), requires a careful examination of tribal sovereignty. *Id.* at 855-56. *See* Petitioner's Brief, p. 9. In order to avoid the analysis, the Intervenor and the Respondents simply state that a careful analysis of tribal sovereignty was conducted. *See* Respondents' Brief, p. 3, and Intervenor's Brief, pp. 24-25. However, there has been no showing of how the sovereignty of the Tribe is adversely affected if the matters in dispute in this litigation are adjudicated in state court.

To avoid the mandatory analysis prescribed in *Montana* and *National Farmers Union*, the Intervenor and the Respondents rely on *Larrivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980), a Montana Supreme Court decision that predates the holdings of *Montana* and *National Farmers Union* and the establishment of boundaries upon tribal civil adjudicatory jurisdiction over non-Indians. The *Larrivee* decision ought not to be considered as authority for the reason that it established concurrent state and tribal jurisdiction over an Indian concerning civil adjudicatory matters. *Larrivee* does not hold that Tribal court has concurrent jurisdiction over non-Indians. *See* Petitioner's Brief, p. 15.

II. No Authority Cited for Supplemental Jurisdiction.

The authority cited by the Respondents and the Intervenor for a supplementary jurisdictional concept is nonexistent. Instead of presenting to this Court case law, statutory authority, or any support whatsoever for a

determination that a tribal court should have supplementary jurisdiction over a non-Indian for the survivorship claim, the Respondents and the Intervenor use the circuitous argument of citing the District Court's decision as authority.

The Tribe also makes use of a clever euphemism, *i.e.*, "tribal descendant," to avoid the stark fact that the decedent Christian Mahler was not an enrolled member of the Tribe. The Tribe stretches the terminology in an attempt to reach a jurisdictional posture that extends the authority of the Tribal Court over a non-Indian whose actions have had no effect whatsoever upon Tribal sovereignty.

The bottom line issue in this litigation is power to adjudicate, which translates to the power to regulate. The Tribe understandably desires to have all encompassing adjudicatory power, and the non-Indians desire that the adjudicatory power be in the State of Montana. The real question to be resolved is what interest tribal government has in the resolution of nonconsensual disputes not governed by its internal law. It is submitted that such disputes have no effect upon tribal self-government (sovereignty) and therefore ought to be regulated in forums other than Tribal Court. The significant need for direction and guidance as to the parameters of jurisdictional boundaries mandates this Court's immediate attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 26th day of October, 1994.

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